Supreme Court, U.S.
FILED
98 424 SEP 1 8 1998
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No. 97-_____

In the

Supreme Court of the United States

October Term, 1997

National Solid Waste Management Association,

Petitioner,

vs.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the market participant exception cover state regulations that direct the purchasing activities of lesser governmental subunits of the state, when the state does not directly raise the taxes and appropriate the funds for those purchasing activities?

RULE 29 STATEMENT

PARTIES TO THE PROCEEDING

Petitioner National Solid Waste Management Association is a non-profit corporation formed under the laws of Illinois. It is a voluntary trade association of approximately 1700 members who are engaged in the waste hauling, processing and disposal industry.

Respondent Charles W. Williams is named in his capacity as Commissioner of the Minnesota Pollution Control Agency, and respondent Edward Garvey is named in his capacity as head of the Office of Environmental Assistance. Both agencies are part of the government of the State of Minnesota.

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Petitioner National Solid Waste Management Association seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 146 F.3d 595 (8th Cir. 1998). (App. 1-9.) The district court opinion, which the Eighth Circuit affirmed, is reported at 966 F. Supp. 844 (D. Minn. 1997). (App. 10-29.)

JURISDICTION

The Eighth Circuit issued its decision on June 12, 1998.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). It raised the Commerce Clause issue presented in this Petition in the first instance before the district court, and the court of appeals addressed that constitutional issue on the merits.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provision Involved

"Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., art I, § 8, cl. 3 (Commerce Clause).

MINNESOTA STATUTES

Minn. Stat. § 115A.46, subd. 5, as amended in 1995, provides in its entirety as follows:

Subd. 5. **JURISDICTION OF PLAN.** (a) After a county plan has been submitted for approval under subdivision 1, a public entity, as defined in section 16B.122, subdivision 1, within the county may not enter into a binding agreement governing a solid waste management activity that is inconsistent with the county plan without the consent of the county.

(b) After a county plan has been approved under subdivision 1, the plan governs all solid waste management in the county and a public entity, as defined in section 16B.122, subdivision 1, within the county may not develop or implement a solid waste management activity, other than an activity to reduce waste generation or reuse waste materials, that is inconsistent with the county plan that the county is actively implementing without the consent of the county.

Minn. Stat. § 16B.122 defines "public entity" as:

> the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another special taxing district, or any contractor acting pursuant to a contract with a public entity.

Other relevant Minnesota statutes are reproduced in the Appendix. (App. 30-36.)

STATEMENT OF THE CASE

Despite this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), invalidating waste designation ordinances, flow control is alive and well in Minnesota. Minnesota law requires local governmental units located in counties that have adopted a preference for waste processing (*e.g.*, composting or incineration) over landfilling to process the solid waste generated by local governmental units even if such disposal is far more expensive than simply sending the waste to an out-of-state landfill. As such, in those counties the state has imposed a regulatory prohibition against landfilling – to the detriment of local governmental units, haulers who have contracted with local governments and the out-of-state landfills that compete with in-state processing facilities. The state does not provide any funding to the local governmental units to pay for the higher disposal costs; rather, local governments must pay the increased costs from their own tax revenues.

Petitioner National Solid Waste Management Association (NSWMA) is a non-profit trade association of companies whose members include numerous haulers and operators of landfills in Minnesota and neighboring states. NWSMA members have contracts with various public entities in Minnesota and are adversely affected by the flow control practices at issue here. Respondent Charles W. Williams is the Director of the Minnesota Pollution Control Agency (MPCA), the state agency charged with enforcing environmental laws and regulations. *See* Minn. Stat. § 116.01 (1996). Respondent Edward Garvey is the Director of the Minnesota Office of Environmental Assistance (OEA), the state agency that must approve the solid waste management plans of local governmental units. Minn. Stat. §§ 115A.055-.12 (1996 and Supp. 1997). Respondents' agencies enforce the state statutory scheme that prevents NSWMA's members

from offering out-of-state disposal services to various local units of government in Minnesota.

In 1980 Minnesota implemented a comprehensive statutory scheme to regulate solid waste disposal.

The genesis of this case is the statutory framework that Minnesota implemented beginning in 1980 to control solid waste disposal. In response to such events as Love Canal in New York, the legislature enacted a regulatory scheme that preferred all other feasible waste disposal options to landfilling. *See* Minn. Stat. § 115A.02(b) (1996). As part of its framework, the legislature required each of Minnesota's 87 counties to develop a waste management plan consistent with the legislature's preferences and to submit their plans to OEA for approval. Minn. Stat. § 115A.46 (1996). Moreover, the legislature has further mandated that solid waste generated in the Twin Cities metropolitan area be processed rather than landfilled. Minn. Stat. § 473.848 (1996).

In response to this legislative initiative, numerous counties and other political subdivisions invested heavily in waste disposal alternatives to landfilling. Resps. Jt. Answer ¶ 10 (P.A. 134-135);[1] *NSWMA v. Williams*, 877 F. Supp. 1367, 1372-73 (D. Minn. 1995). For example, Hennepin County issued "$150,000,000 in bonds for the construction of a 'mass burn' facility which cost $129,000,000 to build." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 922 F. Supp. 1396, 1398 (D. Minn. 1996), *aff'd and rev'd in part*, 115 F.3d 1372 (8th Cir.), *cert. denied*, 118 S. Ct. 629 and 643 (1997). Martin and Faribault Counties spent over $8,000,000 to construct a waste composting plant. *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1387 (8th Cir. 1993).

[1] The abbreviation "App." is to the appendix to this certiorari petition, while "P.A." refers to petitioner's appendix in the appeal below.

Overall, at least 46 of Minnesota's 87 counties, plus one solid waste district, imposed some form of waste processing over landfilling on their residents. *NSWMA*, 877 F. Supp. at 1372.

Minnesota's regulatory scheme authorized flow control.

These new facilities created financial problems for the local governmental entities that built or financed them. Because of the high capital and operating costs of these alternative waste processing technologies, the facilities proved to be uncompetitive with landfills, especially those located out-of-state. *NSWMA*, 877 F. Supp. at 1373; *see* OEA *Solid Waste Fee Report* at 46 (Dec. 1994)(P.A. 88). In 1984, to protect the economic viability of these uncompetitive facilities, and the bonds that financed them, Minnesota implemented a flow control scheme, Minn. Stat. §§ 115A.80-.89, that enabled counties to designate where all local trash had to be hauled. *See Ben Oehrleins*, 115 F.3d at 1376; *NSWMA*, 877 F. Supp. at 1369-70. These ordinances were designed to capture all solid waste within the enacting jurisdiction for processing at the locally preferred facility, regardless of whether such waste was generated by private or public entities. Respondent OEA has to approve the county plans and designation ordinances, while authority to enforce plans once adopted resides in respondent MPCA or the individual counties. *See* Minn. Stat. §§ 115A.034 and 473.811, subd. 5c (1996).

Flow control was struck down.

Through a series of court decisions, a substantial part of this assault on interstate commerce in waste disposal services has been stripped away. In February 1993, the Eighth Circuit found Minnesota's waste designation scheme to be

unconstitutional under the Commerce Clause. *Waste Systems*, 985 F.2d at 1386-89 (county waste designation ordinances "protect in-state economic interests at the expense of out-of-state competitors"). The Eighth Circuit's decision was prescient; one year later, this Court declared waste designation schemes unconstitutional. *Carbone*, 511 U.S. at 386.

After the *Carbone* decision, respondent MPCA abandoned regulatory flow control within the Twin Cities metropolitan area. *See* Consent Decree Modifications and Dismissal of Motions with Prejudice, in *State of Minnesota v. Poor Richard's, Inc.*, No. C5-95-3055, at ¶ IX (Ramsey County Dist. Ct., Nov. 16, 1995) (P.A. 8); *NSWMA*, 877 F. Supp. at 1370. Subsequently, the Eighth Circuit invalidated another aspect of Minnesota's waste designation scheme. In *Ben Oehrleins*, the court held that a county ordinance that required all public and private waste generated within Hennepin County to go to preferred sites violated the Commerce Clause if the waste was intended for out-of-state delivery. 115 F.3d at 1385. For waste generated within the county and intended only for in-state disposal, the court of appeals remanded the case for application of the balancing test adopted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). 115 F.3d at 1387. These decisions opened the Minnesota market for waste disposal to all parties, including out-of-state landfills. Only Hennepin County waste destined for in-state disposal remained subject to flow control.

Minnesota restores flow control because of local government financial problems.

The opening of the Minnesota market to imported waste disposal services created a financial problem for the counties that had built or financed expensive waste facilities without regard to competitive realities. According to respondent OEA,

"[w]ithout designation ordinances, a number of haulers have chosen to take waste to the least costly option – a landfill – in order to take advantage of the lowest tip fee." OEA, *Solid Waste Fee Report* at 5 (Dec. 1994)(P.A. 86); *see NSWMA*, 877 F. Supp. at 1378. Faced with growing pressure to prop up governmentally financed waste disposal facilities, in 1995 the Minnesota Legislature amended § 115A.46, subd. 5 to control the waste stream being generated by governmental units.

The revisions to Minn. Stat. § 115A.46, subd. 5 effectively eliminated out-of-state competition.

The amendment to Minn. Stat. § 115A.46, subd. 5 enforces the local preferences set forth in the waste management plans that counties had adopted pursuant to the legislative mandate. "[T]here are essentially two waste management methods that can be 'chosen' by a county: waste processing and land disposal." *NSWMA*, 877 F. Supp. at 1372. As respondents, the state agencies who enforce Minnesota waste management practices, explain: "[s]ome county plans require waste to be processed, so all public entities in that county must process their waste using waste-to-energy [*i.e.* incineration] or composting facilities." Resps. Fact Sheet (emphasis added) (P.A. 10). Thus, as it relates to public entity waste from those 46 counties and one solid waste district that have selected processing waste over direct landfilling, Minn. Stat. § 115A.46, subd. 5 mandates compliance with county designation plans, even though the flow control provisions that had once proscribed any out-of-state disposal have been held unconstitutional. *See Waste Systems*, 985 F.2d at 1389.

The 1995 amendment to Minn. Stat. § 115A.46, subd. 5 effectively precludes any meaningful competition for the solid waste generated by all of the local governmental units in

nearly all of the counties and one solid waste district whose solid waste management plans require waste processing. There is only one out-of-state processing facility that competes for the disposal of public waste. Minnesota Office of Waste Management, "Regional Waste Management Capacity," at 9 and App. D pp. 37-38 (P.A. 31 and 70-71). And this LaCrosse, Wisconsin incinerator facility receives waste from no more than four Minnesota counties. *Id.* at 31; Resps. Jt. Answer ¶ 24 (P.A. 138). The cost of constructing competing processing facilities to compete for the waste of Minnesota's government entities is prohibitively expensive. *Waste Systems*, 985 F.2d at 1387. Of course, no landfill can compete at all because processing of waste is first required.[2]

Local units of government have complied with designation.

Respondents' agencies have had a vital role in enforcing the flow control scheme established by Minn. Stat. §

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[2] Under Minn. Stat. § 115A.46, subd. 5, the county can consent to landfilling of waste. Such consent is left to the county's unfettered discretion, but if the county elects to permit landfilling in deviation from its plan, the county must further comply with Minn. Stat. § 115A.471. That provision makes any landfilling contingent upon the public entity determining and managing its potential liability arising from the landfilling, rather than processing, of its waste. In the 46 Minnesota counties whose waste management plans have selected processing, a public entity cannot contract for the landfilling of its waste without receiving the consent of the county under § 115A.46, subd. 5 and satisfying the required liability determination and management imposed by § 115A.471. The expense of satisfying this latter requirement makes the option of landfilling illusory because no local governmental unit now is likely to incur the considerable expense needed to obtain county consent to landfill its waste. *See Waste Systems*, 985 F.2d at 1387 (finding no realistic likelihood that anyone would even apply for exemption from county designation ordinance).

115A.46, subd. 5. Since December 1995, respondents have actively assisted in the implementation and enforcement of Minn. Stat. § 115A.46, subd. 5. Resps. Fact Sheet (P.A. 10-11); Jan. 17, 1996 MPCA/OEA letter to City of Loretto (P.A. 12); Dec. 22, 1995, MPCA/OEA letter to Blue Earth County Environmental Services (P.A. 13-14). Local governmental units are forced to comply with these agency directives. *See, e.g*, Nov. 27, 1996 Scott County Environmental Health Dept. letter to A.W. Disposal. (P.A.15-16, 144-45.) For example, the City of Loretto, which used to permit one of NSWMA's members to use an out-of-state landfill (owned by another NSWMA member), now requires that all Loretto city waste go only to Hennepin County's incinerator. (P.A. 144-45.)

Similarly, the City of Minneapolis terminated its exclusive contract with Waste Management, Inc., an NSWMA member, for out-of-state disposal of the city's very sizable waste stream. Minneapolis did so after Hennepin County sued the city to enforce its designation ordinance, as the county is permitted to do under Minnesota's regulatory scheme. *See* Minn. Stat. §§ 115A.034 and 473.811, subd. 5c (1996); *County of Hennepin v. City of Minneapolis*, No. 95-20294 (Henn. County Dist. Ct.) (P. A. 18-29). To resolve the case, Minneapolis agreed to dispose of all of its solid waste at the Hennepin County incinerator.

With the 1995 amendment to Minn. Stat. § 115A.46, subd. 5, Minnesota closed the door to NSWMA's members offering out-of-state waste disposal services to local governmental units in counties where processing is the preferred disposal method. As a result, as a result these units and their constituents, as well as their haulers, are forced to pay more for garbage disposal. But the parties primarily injured are those against whom the legislation is targeted: the out-of-state landfills. The out-of-state landfills are "prohibit[ed] access to [the public entity] waste." *Ben Oehrleins*, 115 F.3d at 1379; P.A. 144-145. The losses to

petitioner's out-of-state landfill members are substantial. *See Waste Systems*, 985 F.2d at 1387.

To reopen Minnesota's public entity market petitioner brought suit in federal court.

To remedy this injury to interstate commerce, NSWMA sued in federal district court seeking declaratory relief and damages under 42 U.S.C. § 1983. In its lawsuit, NWSMA maintained that the legislative scheme set up in Minn. Stat. §§ 115A.46, subd. 5 and 115A.471 violated the Commerce Clause by barring or restricting the interstate commerce in waste disposal services. Indeed, the adverse impact on interstate commerce was virtually conceded. Nevertheless, the district court ruled for respondents, on the ground that the "market participant" doctrine protected the flow control scheme. In the district court's view, when Minnesota counties, cities or other lesser units of government acted, in legal effect it was the State of Minnesota purchasing waste disposal services. (App. 21-22.) Under the market participant doctrine, the state could, through its local subunits, participate in the waste disposal market however it chose. In addition, the district court found that NSWMA lacked standing to challenge Minn. Stat. § 115A.471 because it was not a public entity covered by that particular statute. (App. 27.)

The Eighth Circuit affirmed. Regarding the Commerce Clause attack, the court followed *Trojan Techs., Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), reasoning that the state acts as a market participant when it directs "the purchasing behavior of local governmental units." (App. 8.) The court rejected the contrary view found in *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984), in which the Seventh Circuit held that the state acts as market regulator when it imposes procurement obligations on local

governments without providing any corresponding financial support to meet those obligations. (App. 8.)

In the Eighth Circuit's view, the political subdivisions that were covered by Minn. Stat. § 115A.46, subd. 5 were "creations of the state which derive their power solely from the state." (App. 8.) Rather than regulating, the state was participating in the market through its political subunits. Citing to *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996), the Eighth Circuit concluded that the state "does not run afoul of the Commerce Clause by dictating by contract where the contractor delivers the waste." (App. 8.) Thus, in enforcing Minn. Stat. § 115A.46, Minnesota was merely acting as a market participant and outside the scrutiny of the Commerce Clause.[3]

REASONS FOR GRANTING THE WRIT

This case presents an issue of critical significance to Commerce Clause jurisprudence: Does the market participant exception cover state regulations that direct the purchasing activities of lesser governmental subunits of the state, when the state neither raises the taxes nor appropriates the money to pay for those purchases? When the Court decided *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), it carved out the market participant exception on the premise that a state is entitled to parity with private entities when the state enters the commercial marketplace. *See Reeves, Inc. v. Stake*, 447 U.S.

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[3] The Court of Appeals also affirmed the district court's ruling that NSWMA had no standing to contest enforcement of Minn. Stat. § 115A.471. Petitioner is not contesting that part of the decision below, because invalidating Minn. Stat. § 115A.46, subd. 5 will vitiate Minn. Stat. § 115A.471.

429, 438 (1980)(state as market participant should have treatment accorded private participant).

The decision below departs seriously from that premise. Under the guise of market participation, a state may now insulate from out-of-state competition the purchasing activities of all lesser governmental units. A "Buy Minnesota" requirement will now pass Commerce Clause muster, and all Minnesota cities and counties can be required to purchase only from Minnesota businesses. If the state were truly purchasing those services with funds the state provides, the market participant exception would arguably apply. But here, the taxpayers who are forced to buy more expensive in-state disposal services are paying their taxes to their local governments, not to the state. Hence, the state gets the benefit of the exception without the political burden of levying taxes to fund the purchases. Instead of being free to choose with whom to deal, local units of government are being directed with whom to deal. Economic activity that the market participant doctrine was not intended to cover can now be sheltered from Commerce Clause scrutiny.

There is no doubt that the issue arises in an important context, the handling and disposal of municipal solid waste. The legislative preference for processing waste that Minnesota made in 1980 may have made sense then, but it does no longer. Subsequent federal legislative initiatives have resulted in the closing of unsafe landfills and the opening of environmentally sound ones. *See* 42 U.S.C. § 6944 (1994); 40 C.F.R. parts 257 and 258 (1997). Because they are expensive, state of the art landfills are larger than the obsolete facilities they replaced. Because of the high fixed costs to meet these federal standards, these new facilities have to serve a larger market. As a result, a robust, regional market for waste disposal services has developed. The scheme the

Minnesota legislature adopted in 1980 stands athwart this development.[4]

Minnesota's various efforts at regulating solid waste disposal have been repeated throughout the country. Litigation over flow control has been commonplace, as the courts have been required to set the contours of permissible state regulation of the interstate commerce in waste disposal services. Beginning with *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court has issued five major waste disposal decisions. In each, the Court struck down restrictions on interstate commerce in disposal services.[5] The *Carbone* decision, this Court's most recent pronouncement, should have settled the question of whether flow control ordinances were permissible. With that precedent, expensive government facilities should have begun to stand the test of

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[4] In a report prepared for Congress, the U.S. Environmental Protection Agency debunked the assertion that flow controls, such as are being enforced here, provide an environmental benefit. *See* U.S. Environmental Protection Agency, REPORT TO CONGRESS ON FLOW CONTROLS AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 (1995). The EPA found "no data showing that flow controls are essential either for the development of new solid waste capacity or for the long term achievement of State and local goals for source reduction, reuse and recycling." *Id.* at III-74. Rather, flow controls simply ensure the financial viability of expensive local incinerators or other types of processing facilities. *Id.* at III-5-54. That purpose stands behind the 1995 amendment to Minn. Stat. § 115A.46, subd. 5.

[5] *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978)(outright ban on landfilling out-of-state waste struck down); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992)(fee imposed only on out-of-state waste invalidated); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992)(invalidating prohibition on disposing of noncounty waste unless permitted by county waste management plan); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994)(additional fees on out-of-state waste struck down); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994)(invalidating flow control ordinance).

the marketplace or be subsidized directly by government appropriations. The era of government manipulation of the waste market should have been over.

The unexpected, contrary result is occurring. By protecting governmentally sponsored facilities with flow control, albeit here limited to public entity generated waste, the decision below undoes what *Carbone* accomplished. And the potential impact on interstate commerce goes well beyond the garbage industry. If left standing, the decision below will authorize states to make an easy end run around the Commerce Clause for a very significant part of the state's economy – the expenditures of local governments. That outcome would push the market participation exemption far off of its logical underpinnings. *See Reeves*, 447 U.S. at 436 ("The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law.")

I. The decision below raises an important issue on which there is a clear circuit conflict.

Through the Commerce Clause, the Framers forged a "common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Alexandria Scrap,* 426 U.S. at 803. As Justice Johnson observed long ago, "If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (concurring opinion). The dormant aspect of the Commerce Clause, which prevents states from discriminating against interstate commerce, forestalls the "economic Balkanization" of this country's economy. *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564,

___, 117 S. Ct. 1590, 1599 (1997)(quoting *Hughes v. Oklahoma*, 441 U.S. 322, 324 (1979)). This Court recently described this dormant aspect as perhaps the most important feature of the Commerce Clause. *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 n.9 (1994)(referring to James Madison's comments).

The market participation exception emerged from a narrow line of cases that started with *Alexandria Scrap*. In that case Maryland funded a bounty program to rid the state of abandoned automobiles. Before the state paid the bounty, out-of-state processors had to meet a much more stringent documentation requirement than processors located within Maryland. 426 U.S. at 801. The effect of the documentation requirement was the practical elimination of out-of-state shipments of abandoned automobiles. In affirming the state's right to favor in-state processors, the Court distinguished the bounty program from previously overturned restrictions on interstate commerce. The interstate market for abandoned automobiles still existed, but Maryland's money was keeping most or all of the abandoned automobiles in the state for processing. *Id.* at 810. The Court explained why this disparate treatment was permissible: "Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* (footnotes omitted).

In *Reeves*, the Court articulated the other premise underlying the market participant exception. Affirming the right of South Dakota to prefer in-state customers of its cement plant, the Court examined the dichotomy between the state as market regulator and the state as market participant. In the former instance, regulations that inhibit interstate commerce are struck down. 447 U.S. at 435. In contrast, when it participates in the market, the state is not regulating the flow of commerce, but merely influencing that flow like

any private entity, with the impact of purchasing dollars. "Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439.

The decisions in *Alexandria Scrap* and *Reeves* involved the state directly as the market participant. In *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983), the market participant exception was applied to a political subdivision's expenditure of funds. By executive order, Boston required contractors working on city-funded construction projects to hire city residents for at least one-half of their work forces. The Court readily extended the market participant exception to the city: "Alexandria Scrap and Reeves, therefore, stand for the proposition that when a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause." 460 U.S. at 208 (emphasis added). This statement indicates the Court's view that the exception applied to states and any local governmental units. Critical to this conclusion was the Court's focus on the source of funding: "Insofar as the city expended only its funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of Hughes v. Alexandria Scrap Corp." *Id.* at 214-15 (citation omitted).

In *Alexandria Scrap, Reeves* and *White*, the Court provided market protection because the governmental units whose conduct was questioned were spending their own tax dollars in the marketplace. That is significant, because for market participation analysis, there is a direct functional connection between the raising and spending of funds. A unit of government, whether state or local, may raise its funds in a variety of ways and exploit its sources of taxes to various degrees. When a unit of government enters the marketplace for goods or services, its taxpayers inherently are agreeing

that the use to which those funds are put is socially beneficial. Moreover, when a governmental unit uses its own funds in the market, it decides with whom it should deal to best meet the goals that the governmental unit seeks. State-mandated purchasing requirements imposed on local governments cut against this connection and undermine the inherent premise of the market participant exception – that governmental purchases that create market demand cannot be seen as interfering with interstate commerce. *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause,* 88 MICH. L. REV. 395, 482-84 (1989)[Coenen]; *see also* Paul S. Kline, *Publicly Owned Landfills and Local Preferences,* 96 DICK. L. REV. 331, 371-74 (1992)[Kline](if state is spending its own funds, then local preferences are less unfair, because directly affected taxpayers pay the expense of preferences and thus have an inherent interest in avoiding misuse). If the notion of parity that underlies the market participant exception still holds, then, like private businesses which spend their own funds, government entities must do so as well to avoid Commerce Clause scrutiny. Private businesses cannot direct how other business entities spend without providing the money to fund mandated purchases.

The Court has never addressed the circumstance presented here – where a superior governmental unit directs how a lesser governmental unit is to spend certain funds. *See Reeves*, 447 U.S. at 437 n.9 (reserving question of legality of "Buy American" programs). The circumstance has, however, been addressed on four occasions by the circuit courts. The result is a clear and irreconcilable conflict among the decisions reached by these courts. The court below followed the analysis of the Third Circuit set forth in *Trojan Techs., Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied,* 501 U.S. 1212 (1991), in which the issue was whether Pennsylvania's "Buy American Steel" law, which

applied to all governmental entities in the state, passed Commerce Clause muster. Though the case involved foreign and not interstate commerce, the Third Circuit held that the market participant exception applied to the state's actions against foreign commerce. The court rejected the Commerce Clause challenge brought by a Canadian manufacturer, holding that the Commonwealth of Pennsylvania was the market participant acting through its local governmental units. *Id.* at 911. These entities were no different than a central state agency. "Both exist only through affirmative acts of the state." Having created these local governmental units, the State could "also restrict the contracting authority of such local bodies." *Id.*

The Ninth Circuit analyzed the issue similarly in *Big Country Foods, Inc. v. Board of Educ. of Anchorage*, 952 F.2d 1173 (9th Cir. 1992). In *Big Country*, a dairy distributor attacked an Alaskan statute that gave a 7% bidding preference to milk produced in-state. The bidding preference for Alaskan milk was upheld because the state was participating in the market through the Anchorage school district. *Id.* at 1179. "Political subdivisions generally exist at the will of the state. A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance." *Id.* (citations omitted). In dicta, the Ninth Circuit rejected the argument of the federal government (a party in the case), that the local school district should be regarded as the market participant because the district was required to grant the bid preference by state law. *Id.* at 1173 n.4.[6]

On the other side of this important issue is the Seventh Circuit. In *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d

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[6] *See also Smith Setzer & Sons, Inc. v. South Carolina Review Panel*, 20 F.3d 1311, 1319 (4th Cir. 1994) (endorsing in dicta the reasoning of *Trojan Technologies*).

486 (7th Cir. 1984), the court reviewed a state statute requiring contractors on all public works projects in Illinois to hire only Illinois laborers, unless the contractor certified that qualified residents were unavailable. *Id.* at 489. The Seventh Circuit distinguished between due process and equal protection jurisprudence under the Fourteenth Amendment, when local governmental units are treated as part of a "state," and situations like that presented under the Commerce Clause. *Id.* at 495. Writing for the court, Judge Posner reasoned that when a state enforces local procurement policies without appropriating any funds, the conduct in question is regulation, not market participation. *Id.* at 496. Moreover, he reasoned, there is a quantitative difference between direct state purchases and unfunded purchasing mandates that the state imposes on local governmental units: more governmental purchasing is done by local units of government, and thus more damage can be done to the principles of free trade embodied in the dormant Commerce Clause. *Id.*

All three courts that found market participation expressly considered and rejected the analysis of the Seventh Circuit in *Bernardi*:

Third Circuit:	"Respectfully we disagree. We find no compelling analytical difference between a local governmental unit and central state agencies." 916 F.2d at 911.
Ninth Circuit:	"We agree with the Third Circuit in *Trojan Technologies*." 952 F.2d at 1179.
Eighth Circuit:	"We are persuaded by the reasoning of the Third Circuit." (App. 8.)

The conflict among the circuits is undeniable and irreconcilable. *See* Kline at 418. The local hiring preferences that were struck down in *Bernardi* would have been regarded as market participation in *Trojan Technologies*. Under that decision, the Third Circuit would have deemed the state to be the contracting entity that was requiring American-made steel in its public works projects. Conversely, if the *Bernardi* analysis had been applied to this case, Minnesota's regulatory scheme would have been struck down because the local entities were purchasing the services and signing waste disposal contracts. Under *Bernardi*, when a local governmental unit is told where to purchase disposal services, the state is engaged in market regulation, not participation.

This Court's precedents demonstrate that the Third Circuit's analysis is too simplistic. Under the Eleventh Amendment, a state cannot be sued for money damages, yet a local governmental unit can be. *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). Likewise, in holding that cities were "persons" under the antitrust laws, this Court observed that "States' subdivisions generally have not been treated as equivalents of the States themselves." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). Though the state action antitrust exemption implicates state sovereignty, the Court has refused to extend that exemption carte blanche to states' political subdivisions because of "the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals...." *Id.* at 412-13. Paradoxically, in *Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 423-25 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985), a case that also involved solid waste flow control, the Eighth Circuit discussed at length the justification for distinguishing between states and local governments when applying the state action exemption in

antitrust cases – the implications of which the Eighth Circuit wholly ignored in its decision below.

Though this Court has noted that cities derive their authority from the state, *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 215 (1984), that axiom hardly resolves the issue. A state may perhaps dispense with lesser units of government,[7] but having created and empowered them,[8] these political subdivisions are separate entities that act independently in the commercial marketplace. Cities and counties unquestionably have independent legal status. They may enter into commercial contracts, *see* Minn. Stat. § 471.345 (1996); if they breach a commercial contract, it is the city or county that is legally liable, not the state. The significance of this fact is not that the question presented turns on subtle questions of state law. Rather, the existence of these legal rights of counties and cities – common throughout the country – merely illustrates elementally that where the decision gets made to use taxpayer funds is significant when deciding whether the market participation exception applies. Thus, when a state tells its

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[7] For example, unlike nearly all other states, Hawaii has a unified state school system, with a state-wide elected school board that administers two regional school districts. *See* Haw. Const. art. X, §§ 2 and 3.

[8] While created by the state, in Minnesota there are constitutional restrictions that protect the status of counties and cities. County boundaries may not be changed without voter approval. *See* Minn. Const. art XI, § 3. Home rule government is constitutionally guaranteed, *see id.*, § 4, and commonly used by Minnesota cities and, more recently, counties. *See* Michele Timmons *et al.*, *County Home Rule Comes to Minnesota*, 19 WM. M. L. REV. 811, 823 (1993). Home rule government has been widely adopted throughout the country and is intended to protect the independence of the local government that adopts it. *See, e.g., City of La Grande v. Public Employees Retirement Bd.*, 281 Ore. 137, 576 P.2d 1204, 1207-08 (1978); *Perales v. Heimbach*, 166 A.D.2d 707, 561 N.Y.S.2d 290, 291 (1990) *app. denied*, 77 N.Y.S.2d 913 (1996).

subunits what to do in the commercial marketplace, common sense shows that the command is regulatory, a conclusion reinforced when the source of funding for the procurement mandate is the local taxpayer, not the state. *See* Coenen at 483-84 (forcing municipalities to make purchases they would not otherwise make looks more like regulation than participation); Stanley E. Cox, *Garbage in, Garbage out, Court Confusion about the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 203 (1997)(the question is whether the state has truly entered the market or merely masked its regulations through purchasing directives).

Thus far, this Court has found market participation only when there was a direct connection between the entity raising and spending the funds. Breaking that direct linkage practically ensures that the protection the waste industry received from *Carbone* will be undone as other states follow the road map drawn by the Eighth Circuit. Moreover, the analysis of market participation the Eighth Circuit employed goes well beyond the waste industry. Every state has its own parochial interests to take care of – "Buy Nebraska beef" or "Buy Massachusetts milk" – could become commonplace purchasing regimes that states could impose on their political subunits. For instance, what Massachusetts failed to accomplish ultimately in *West Lynn* could be revived by legislation that compels public entities like schools to purchase only locally produced milk. That effort would be contrary to the essential function of the Commerce Clause and the Court's recent decisions in *Carbone*, *West Lynn* and *Camps Newfound/Owatonna*.

As Judge Posner noted, there is an analytical difference between the state directing local purchasing and the state actually making the purchases. The fundamental premise to the market participant exception – parity in the marketplace – applies only to the latter. Unfunded purchasing mandates to local governmental units are not market participation, but

regulations that must be subject to Commerce Clause scrutiny.

The impact of the decision below is potentially very large. The prospect of state-mandated purchasing regimes need not stop at disposal services. All governmental procurement within a state could be covered, for nothing in the rationale of the Eighth Circuit's decision prevents that result. In good economic times that prospect may seem unlikely, but in hard times the impulse to protect in-state employment could prove insurmountable. In *West Lynn* this Court was sufficiently concerned about the effects of such economic protectionism – or Balkanization – that it overturned a protectionist regime that had been implemented to aid a troubled industry. The Court should do so here, to prevent the potential harm to the national market that could result if the decision below is left standing.

CONCLUSION

The conflict among the circuits has existed long enough that no further development of the question is needed. The decision below, if left standing, portends a serious erosion of the national market the Framers intended to ensure with the Commerce Clause. The issue is important, and the conflict is irreconcilable. Review by this Court is thus warranted. S. Ct. R. 10 (a). Accordingly, petitioner NSWMA requests that the Court issue a writ of certiorari to review of the decision of the Eighth Circuit in this case.

Dated: September 10, 1998.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-2987

National Solid Waste Management Association,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Charles W. Williams, in his official capacity as Commissioner of the Minnesota Pollution Control Agency; Edward Garvey, in his official capacity as Director of the Minnesota Office of Environmental Assistance,	*	
Appellees.	*	

Submitted: March 13, 1998
Filed: June 12, 1998

Before BEAM and HEANEY, Circuit Judges and KOPF,[1] District Judge.

BEAM, Circuit Judge.

The National Solid Waste Management Association (the Association) appeals the district court's[2] grant of summary judgment against it in its action asserting that two Minnesota state statutes violate the Commerce Clause of the United States Constitution Because we find that the Association lacks standing to challenge one statute, and find that the other statute passes constitutional muster, we affirm.

I. BACKGROUND

The disposition of garbage has become a popular subject of Commerce Clause analysis in recent years. See, e.g., Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1376 n.2 (8th Cir.), cert. denied, 118 S. Ct. 629 (1997). This appeal is the latest round in a series of litigation spawned by the State of Minnesota's attempts to control the collection, processing, and disposal of waste. See id. at 1376-77.

Minnesota's legislature enacted the Waste Management Act in an attempt to manage solid waste disposal in that state. Among other things, the Act requires counties to implement comprehensive waste management plans.[3] See Minn. Stat. §§

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

[2] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

[3] These county plans must: (1) evaluate the waste generation habits of a county's population; (2) project the amount of waste that will be

115A.46 and 473.803 . Subdivision 5(b) of section 115A.46 (hereinafter "subdivision 5") then requires public entities to manage their solid waste in accordance with the relevant county plan. For example, if the county plan requires that garbage be hauled to a specific facility, all public entities within the county must have their waste delivered to that facility.

If a public entity wishes to act contrary to the county plan, section 115A.47 applies. That section first requires determination of whether the county's designated method is favored over the entity's proposed method according to a statutory list ranking waste management practices. See Minn. Stat. §115A.02(b). If the county's method is preferred, the public entity must (l) determine the potential liability to the public entity and its taxpayers for managing the waste as the entity proposes; (2) develop a plan for managing that potential liability; and (3) submit that information to the state. See Minn. Stat. § 115A.471.

The Association is a non-profit trade association, whose members include Minnesota businesses which have waste collection and disposal contracts with various Minnesota public entities. The Association filed suit, naming Charles Williams, in his official capacity as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey in his official capacity as Director of the Minnesota Office of Environmental Assistance (the state). The Association alleged that subdivision 5 and section 115A.471 both contravene the Commerce Clause of the United States Constitution.

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generated in the county over the next decade; (3) describe programs to assure that the county will meet statutorily established recycling goals; and (4) analyze and propose environmentally preferred means of safely managing the county's projected waste stream. Minn Stat. §§ 115A.46, 115A.55 1, subd.6, 473.803, and 473.811.

The district court granted summary judgment in favor of the state. It held that: (1) subdivision 5 does not violate the Commerce Clause; and (2) the Association lacks standing to challenge section 115A.471.[4] The Association appeals.

II. DISCUSSION

A. Standing

"Standing is the constitutional requirement, imposed by the 'cases or controversies' provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit." Ben Oehrleins, 115 F.3d at 1378. In order to have standing, the Association must have suffered an injury in fact, must establish a causal connection between that injury and the Minnesota statutes it challenges, and must establish that this injury is redressable by this court. See Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1016-17 (1998). Although the Association has met these requirements regarding subdivision 5, we find that it has not met them with regard to section 115A.471.

Subdivision 5 and section 115A.471 both refer to "public entities," but each defines that term differently. Subdivision 5 applies to:

> the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another

[4] The court also granted summary judgment sua sponte on the Association's claim under 42 U.S.C. § 1983, reasoning that the civil rights claim alleged no constitutional violation. That ruling has not been appealed.

special taxing district, or any contractor acting pursuant to a contract with a public entity.

Minn. Stat. § 16B.122, subd. 1(f) (emphasis added). As "contractors," the Association's members are, therefore, constrained to act in accordance with the applicable county plan when they service the waste produced by their public clients. The statute thus constrains their actions and has consequently caused an injury in fact to the Association's members which can be redressed by this court. Therefore, as the state concedes, the Association has standing to challenge subdivision 5. See Carson v. Pierce, 719 F.2d 931, 933 (8th Cir. 1983) (noting that association has standing as representative of its members).

However) section 115A.47 1 contains a different definition:

> "public entity" means the state; an office, agency, or institution of the state; the metropolitan council; a metropolitan agency; the metropolitan mosquito control district; the legislature; the courts; a county; a statutory or home rule charter city; a town; a school district; another special taxing district; or any other general or special purpose unit of government in the state.

Minn. Stat. § 115A.47 1 (b). Here, there is no mention of contractors acting on behalf of the state. Under the terms of the statute, the Association's members are not public entities and the Association does not contend that it is arguing on behalf of a public entity. Therefore, section 115A.471 imposes no obligations on the Association's members and cannot cause any injury in fact.

In an attempt to establish its claim of injury in fact, the Association submitted an affidavit from one of its members.

The affiant makes the general assertion that the cost to public entities of complying with 115A.471 "dwarf[s] the size of [our] public entity's waste disposal contracts." However, even if this assertion were proved, it would not bolster the Association's position. In order to establish an injury in fact, the Association must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The Association has not linked the fact that compliance with section 115A.471 is expensive for public entities with any "concrete and particularized" harm to its members. Id. Although the affidavit reports that all of the business's "pre existing contracts with public entities . . . have since been redrafted" to comply with section 115A.471, there is no allegation that renegotiating these contracts damaged a "legally protected interest." Id. We cannot discern any injury in fact visited upon the Association by section 115A.471. We therefore hold that the Association lacks standing to challenge that statute.

B. Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has a "negative" or "dormant" aspect which "has long been understood to . . . def[y] the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v Department of Envtl. Quality, 511 U.S. 93, 98 (1994). Under the dormant Commerce Clause, statutes that require all waste generated within a geographic area to be disposed of at favored facilities, so-called "flow control ordinances," have been

declared impermissible burdens on interstate commerce. See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Ben Oehrleins, 115 F.3d at 1 384. The Association calls subdivision 5 a "public entities waste flow control law" and asserts that, as flow control, it is invalid.

To ascertain whether a state activity violates the dormant Commerce Clause, we begin by determining whether the state is "regulating" the market or merely "participating" in it. See Reeves, Inc. v. Stake, 447 U.S. 429, 436-39 (1980). If the state activity constitutes only market participation, then the Commerce Clause does not apply and our inquiry ends. See id. To ascertain whether a state is acting as a market participant, we ask "whether the state is actually participating in a narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants." Chance Management, Inc. v. South Dakota, 97 F.3d 1107, 1111 (8th Cir. 1996), cert. denied, 117 S. Ct. 1083 (1997). The state argues that subdivision 5 merely establishes parameters for the state's purchase of waste disposal services. The Association responds that subdivision 5, in constraining the behavior of local government units, regulates the behaviour of market participants other than the state. We have not previously addressed the question of whether a local entity is equivalent to the state for purposes of market participant analysis. Other circuits have split on the issue.

The Seventh Circuit has held that when a state imposes requirements on local government without any state financial support or supervision, the state is not a participant in the project, but a regulator not within the market participant exception. W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 495 (7th Cir. 1984). By contrast, the Third Circuit found "no compelling analytical difference between a local government unit and central state agencies." Trojan Tech., Inc., v. Pennsylvania, 916 F.2d 903, 911 (3d Cir. 1990). "Both exist only through affirmative acts of the state. A municipality

derives its authority from the state." Id. Two other circuits have adopted this reasoning. See Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1319-20 (4th Cir. 1994); Big Country Foods, Inc. v. Board of Educ., 952 F.2d 1173, 1179 (9th Cir. 1992).

We are persuaded by the reasoning of the Third Circuit. In this case, the state is performing as a market participant in directing the purchasing behaviour of local governmental units. Under Minnesota state law, the legislature has unlimited authority over local governmental units. Under Minnesota state law, the legislature has unlimited authority over local governmental units. See Erickson v. Gram, 210 N.W. 616, 616 (Minn. 1926). All of the public entities covered by subdivision 5 are creations of the state which derive their power solely from the state. We are hard pressed to fathom how an entity created by the state, controlled by the state, and subject to the absolute power of the state, should be considered an independent entity when it undertakes to buy waste services on the open market. Public entities should not be considered independent from the state when they contract for the removal of their waste.

When a state contracts for garbage service, it does not run afoul of the Commerce Clause by dictating by contract where the contractor delivers the waste. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 510 (2d Cir. 1995) ("to the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals -- just as if it were a private party"), cert. denied, 516 U.S. 1112 (1996). Subdivision 5 applies only to the waste generated by public entities and does not reach beyond those parties who, like the Association's members, "are actually and freely dealing with the state in its business enterprise."[5] Chance Management, 97 F.3d at 1112.

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[5] The Association posits in a footnote to its brief that applying the

Because the state's actions here are performed as part of its role as a purchaser of waste disposal services, it is a mere market participant and the Commerce Clause does not apply. The state is, therefore, entitled to summary judgment in its favor on the Association's claims.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

ATTEST

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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market participant doctrine to subdivision 5 opens the door to allow counties to resurrect flow control over private generators by simply taking over garbage collection as a public function. Indeed, there is evidence in the record that the Tri-County Solid Waste Management Commission is contemplating just such a step. We are aware that at least one circuit court has held that this would be constitutionally permissible. See Sal Tinnerello & Sons, Inc. v. Town of Stonington, No. 97-7919, 1998 WL 152981 (2d Cir. Apr. 3, 1998). The Supreme Court has recently warned courts to "put aside the natural urge to proceed directly to the merits of [an] important dispute and to settle it for the sake of convenience and efficiency." Raines v. Byrd, 117 S. Ct. 2312, 2318 (1997). Accordingly, we expressly decline any comment on the propriety of a governmental entity assuming public control of all waste disposal within its borders in order to resurrect a previously unconstitutional flow control ordinance.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

National Solid Waste Management Association,

Plaintiff,

v.

Charles W. Williams, in his official capacity as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey, in his official capacity as Director of the Minnesota Office of Environmental Assistance,

Defendants.

Civil No. 4-96-388(DSD/JMM)

ORDER

Timothy R. Thornton, Esq., Jack Y. Perry, Esq. and Briggs & Morgan, 2400 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, counsel for plaintiff.

Dwight S. Wagenius, Esq., Beverly M. Conerton, Esq., Minnesota Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 counsel for defendants.

This matter is before the court on plaintiff's and defendants' cross-motions for summary judgment. Based on a review of the file, record and proceedings herein, and for the

reasons stated, the court grants defendants' motion, and denies plaintiff's motion.

BACKGROUND

Plaintiff National Solid Waste Management Association ("NSWMA") is a trade association of companies engaged in providing waste management services. Many of NSWMA's members participate in the movement and disposal of waste in interstate commerce. Plaintiff asserts that its members have waste collection and disposal contracts with Minnesota public entities. Defendant Charles W. Williams is the Commissioner of the Minnesota Pollution Control Agency ("MPCA"), which is the state agency formed to meet "the variety and complexity of problems relating to water. air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state." Minn. Stat. § 116.01. Defendant Edward Garvey is the Director of the Minnesota Office of Environmental Assistance ("OEA"), which provides "technical and financial assistance for development, planning and implementation of state policies related to waste management." Affidavit of Arthur E. Dunn, Deputy Director of OEA; see Minn. Stat. §§ 115A.055-115A.12.

The Minnesota Legislature enacted the Waste Management Act in 1980, codified at Minnesota Statutes, Chapter 115A ("the Act"). The declared goals of the Act are "co protect the state's land, air, water, and other natural resources and the public health by improving waste management," and "to foster an integrated waste management system in a manner appropriate to the characteristics of the waste stream ...." Minn. Stat. § 115A.02(a)(b). The "integrated waste management system" includes a hierarchy of preferences for the management of waste, in descending order of preferences being waste reduction and reuse, waste

recycling, composting of yard waste and food waste, resource recovery through mixed municipal solid waste composting or incineration, and land disposal. Minn. Stat. § 115A.02(b)(1)-(5). The Act requires counties to establish and implement plans addressing the state policies and purposes which are not inconsistent with state law. Minn. Stat. § 115A.46; see Ben Oehrleins v. Hennepin County, F.3d ___ (8th Cir. 1997). In preparing the plans, political subdivisions are required to consult with persons providing solid waste collection, processing, and disposal services. Minn. Stat. § 115A.46, subd. l(d). The plans must be initially approved and then updated and resubmitted for approval every five years. Minn. Stat. § 115A.46, subd. l(e)(f).

The Act also speaks directly to public entities. Minn. Stat. § 115A.46, subd. 5 (describing the "Jurisdiction of Plan"); Minn. Stat. § 115A.471 (describing "Public entities; management of solid waste"). The Act provides for the jurisdiction of a county plan:

> (a) After a county plan has been submitted for approval ..., a public entity ... within the county may not enter into a binding agreement governing a solid waste management activity that is inconsistent with the county plan without the consent of the county.
>
> (b) After a county plan as been approved ... the plan governs all solid waste management in the county and a public entity ... within the county may not develop or implement a solid waste management activity, other than an activity to reduce waste generation or reuse waste materials, that is inconsistent with the county plan that the county is actively implementing without the consent of the county.

Minn. Stat. § 115A.46, subd. 5. A "public entity" is defined as "the state, an office, agency, or institution of the state the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another special taxing district, or any contractor acting pursuant to a contract with a public entity." Minn. Stat. § 16B.122, subd. l(f).

In addition, if the public entity enters into or approves a contract for the management of mixed municipal solid waste which would manage the waste using a waste management practice that is ranked lower on the list of preferred waste management practices than the waste management practice selected in the county plan for the county in which the waste was generated, the public entity must: "(1) determine the potential liability to the public entity and its taxpayers for managing the waste in this manner; (2) develop and implement a plan for managing the potential liability; and (3) submit the information from clauses (1) and (2) to the agency." Minn. Stat. § 115A.471. "Public entity" under section 115A.471 is defined more narrowly than under section 115A.26. Under section 115A.471, "public entity" means "the state; an office, agency, or institution of the state; the metropolitan council; a metropolitan agency; the metropolitan mosquito control district; the legislature; the courts; a county; a statutory or home rule charter city; a town; a school district; another special taxing district; or any other general or special purpose unit of government in the state." Thus, the requirements of section 115A.471 do not apply to contractors.

Plaintiff challenges sections 115A.46, subdivision 5, and 115A.471 as in violation of the Commerce Clause. Plaintiff asserts that the statutes restrict the flow of interstate commerce and bar the importation of waste processing services. Plaintiff argues that the statutes are per se "economic protectionist" measures aimed at isolating in-state processing

facilities from the state and national solid waste market, specifically the out-of-state landfills. Plaintiff urges that the statutes are subject to strict scrutiny and that no health, safety or welfare purpose exists for mandating that all Minnesota generated waste from counties with designated waste processing facilities and under contract with a public entity be disposed of at these processing facilities. Plaintiff claims that the sole purpose of the statutes is to favor local processing facilities against all out-of-state landfills. In addition, plaintiff claims that there are several less discriminatory alternatives to sections 115A.46, subdivision 5, and 115A.471, such as imposition of general taxes or institution of a competitive disposal price. Plaintiff's Complaint at ¶¶ 47-56.

The plaintiff's challenge is not the first attack on provisions or implementations of the Act. See Ben Oehrleins v. Hennepin County, ___ F.3d ___ (8th Cir. 1997) (affirming finding that enactment pursuant to §§ 115A.80-.893 was in violation of the Commerce Clause); Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381, 1388-89 (8th Cir. 1993) (affirming finding of violation of the Constitution); National Solid Waste Management Assn. v. Williams, 877 F. Supp. 1367, 1379-80 (D. Minn. 1995) (finding § 115A.47 violative of the Commerce Clause); see also C & A Carbone, Inc. v. Town of Clarkstown, NY, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (determining that a flow control ordinance violated the Commerce Clause). Plaintiff claims that the discriminatory effect of the statutes at issue in this case is merely a resurrection of designation with a more limited scope; in other words, only the public entity is affected. Thus, plaintiff argues that the out-of-state landfill market is "absolutely excluded from competing for the public entity waste stream." Plaintiff's Memorandum in Support of Motion at 23.

The defendants argue that the statutory provisions challenged in this case do not regulate the conduct of private

persons involved in the waste market and, thus, are unlike the statutes or ordinances at issue in prior cases. The defendants summarize section 115A.46, subdivision 5, by stating that "when a public entity takes on a solid waste management activity, such as garbage collection and disposal or recycling or yard waste management, either using government workers and equipment or hiring contractors to act on behalf of the government, it must do so in a manner that is consistent with certain conditions ... [which] are set out in a county's solid waste management plan." Defendant's Memorandum in Support of Summary Judgment at 4. Defendants also argue that section 115A.471 "does not obligate any entity, private or public, to undertake or refrain from undertaking any waste management practice. Rather, it merely requires public entities to assess and plan for their potential liability if they decide to undertake certain waste management activities." Defendant's Memorandum in Support of Motion at 4.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). A fact is material if its resolution affects the outcome of the case. There is a genuine of issue of fact if the evidence is such that it could be resolved in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Judgment is granted for the moving party if, under the governing law, there can be but one reasonable conclusion as to a jury's verdict. Id.

On a motion for summary judgment, all evidence and inferences are viewed in a light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Nevertheless, the nonmoving party may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. Celotex, 477 U.S. at 324. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted for the defendant because a failure of proof regarding an essential element
necessarily renders all other facts immaterial. Id. at 322-23. With this standard at hand, the court addresses defendant's motion for summary judgment.

B. The Commerce Clause

The Commerce Clause of the Constitution of the United States provides that "Congress shall have Power ... [t]o regulate Commerce ... among the several States ...." U.S. Const., art. I, § 8, cl. 3. Although the language provides an affirmative grant of power to Congress, the Clause is also recognized as "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." Independent Charities of America v. State of Minn., 82 F.3d 791, 798 (8th Cir.) (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 104 S. Ct. 2237, 2240, 81 L. Ed. 2d 71 (1984)), cert. denied, 117 S. Ct. 482 (1996). The "negative" or "dormant" aspect is understood to deny "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon, 511 U.S. 93, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994); see National Solid Waste Management Ass'n, 877 F. Supp. at 1373 (quoting Oregon Waste Sys.). In essence, the dormant Commerce Clause prohibits economic protectionism

- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). However, the courts have drawn a distinction between state regulation of a market and state participation in a market, thereby recognizing that the Commerce Clause does not apply to a market participant. See Chance Management, Inc. v. State of S.D., 97 F. 3d 1107, 1110 (8th Cir. 1996), cert. denied, 117 S. Ct. 1083 (1997); see also Wunnicke, 467 U.S. at 93-95; White v Massachusetts Council of Const. Employers, Inc., 460 U.S. 204, 208, 103 S. Ct. 1042, 1044-45, 75 L. Ed. 2d 1 (1983); Reeves, Inc. v. Stake, 447 U.S. 429, 436-37, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-10, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."). "A state acting as a market participant is free from the strictures of the Commerce Clause because 'there is no indication that the [Commerce] Clause was intended to limit the ability of the [s]tates themselves to operate in the free market.'" Chance Management, 97 F.3d at 11 (quoting Charities, 82 F.3d at 799). The court's inquiry in the market participation cases is whether the state is participating in a narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants. See id. "To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals - just as if it were a private party." See Corp. v. Town of Smithtown, 66 F.3d 502, 511 (2nd Cir. 1995), cert. denied, 116 S. Ct. 911 (1996).

1. Section 115A.46, subdivision 5

In this case, defendants assert that section 115A.46, subdivision 5, requiring public entities to comply with county plans, is a self-limiting rather than market-regulating statute. Defendants assert that the statute merely establishes conditions when a public entity, on its own or through contractors, collects or disposes of garbage. Defendants argue that when a public entity collects or manages waste using government workers and equipment, it is performing activities that a private party could perform; in other words, the government is acting in a proprietary function. The defendants assert that in doing so, the public entity may act as an employer contracting for services. Defendants argue that this case is distinguishable from previous cases because, whereas designation applied to all entities, public and private, and to all solid waste residential and business, section 115A.46, subdivision 5 only applies to public entities that manage waste and then only to the waste that the public entity chooses to manage.

NSWMA argues that the statute is a "state-mandated local preference" statute which should not be subject to the market participant exception. In support of its position, NSWMA relies on a Seventh Circuit Court of Appeals decision authored by Judge Posner. See W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984). In Bernardi, the plaintiff challenged an Illinois state statute which required any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit, to employ only Illinois laborers on such project or improvement, unless laborers were not available or not capable of performing the particular type of work involved. A public school board hired an Illinois corporation to replace some windows; the Illinois corporation then subcontracted the work to an unincorporated association of

Missouri residents, in contravention of the local preference statute. The court determined that the State of Illinois was a regulator and the public entity, the local school board, was the market participant. The market participant exception did not apply to the Illinois preference law. In making this determination, the Seventh Circuit recognized that the window-replacement project was not financed or administered by the state. Instead, "[t]he state [wa]s a regulator telling thousands of local government units that they must not give construction contracts to employers of nonresidents." Id. at 495. In finding that the market participant exception did not apply, Judge Posner reasoned:

> The difference between the state's preferring state residents in its own dealings and forcing local agencies to do so in theirs is both analytical and quantitative. When the project on which the state impresses a home state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project but a regulator. And since more public contracting in the states is done at the local level, by cities, school districts, park districts, counties, etc., than at the state level, extending [the market participant exception] to cases where the state's relationship to its local agencies is purely regulatory could do great damage to the principles of free trade on which the negative commerce clause is based.

Id. at 496. Based on that analysis, plaintiff asserts that the Minnesota statute is regulating public entities rather than acting as a market participant; therefore, NSWMA argues, the market participant exception does not apply.

Defendants assert that for market participation purposes, plaintiff's distinction between the state and subdivisions is

inconsequential. The parties recognize that there is a division among the circuit courts with respect to this issue and that the Eighth Circuit Court of Appeals has not spoken. Defendants urge the court to adopt the analysis of the Third and Ninth Circuits which differ in opinion from the Seventh Circuit. In Trojan Technologies Inc. v. Commonwealth of Pa., 916 F.2d 903, 911 (3d Cir. 1990), certiorari denied, 501 U.S. 1212 (1991), the Third Circuit disagreed with the Bernandi court and found no analytical difference between a local government unit and central state agencies. The Trojan court reasoned that both exist through the affirmative acts of the state, and that a municipality derives its authority from the state. Id. at 911. Because under Pennsylvania law it was clear that the local bodies existed only by state authority and with such powers as the state affirmatively provided, the court saw "no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies." Id. Furthermore, because "imposing such restrictions on central state agencies certainly would be permitted," the court did not "believe restrictions on local bodies stand in any different light." Id.

In Big Country Foods, Inc. v. Board of Education of Anchorage Sch. Dist., 952 F.2d 1173, 1178-79 (9th Cir. 1992), the court addressed the issue of whether the market participant exception could apply to a state statute requiring its political subdivisions to favor state residents in the procurement or sale of goods. The Ninth Circuit likewise disagreed with Bernandi and followed the Trojan court's rationale that political subdivisions generally exist at the will of the state. The Big Country court explained:

> A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance.

> A rule that would consider all political subdivisions as separate from state control for market participant purposes would be anomalous to the proposition that political subdivisions exist at the will of the state. A rule that would consider some political subdivisions as separate from the state controls would lead to difficult case-specific inquiries into the degree of subdivision autonomy.

Id. at 1179; see also Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1319 (4th Cir. 1994) (agreeing with the Third and Ninth Circuits that the distinction drawn by the Seventh Circuit "simply does not make sense in this constitutional matter"). The Ninth Circuit concluded that the State of Alaska did not impose an impermissible downstream requirement by forcing school districts to enter into contracts on terms set by state requirements, and applied the market participant exception.

Although the Eighth Circuit Court of Appeals has not addressed this issue, this court is guided by the analysis of the Third and Ninth Circuits. This court determines that the application of the market participant exception is not thwarted by the fact that section 153A.46, subdivision 5, places requirements on public entities when they partake in solid waste management activity. In this instance, the statute does not require the public entity to collect or dispose of waste, but when it chooses to do so, it must comply with the county's plan. This court is persuaded by defendants' argument that the state agencies and political subdivisions derive their authority from the state. See e.g., Minn. Const., art. 12, § 3 (providing that the legislature may provide for the creation, organization, administration, consolidation, division and dissolution of local government units and their functions). The logical extension of that relationship between the state and subdivisions, as discussed in Trojan and Big Country,

includes the ability of the state to set parameters for its governmental units as market participants. This court concludes that the fact the conditions in this case are contained in a state statute enacted at the state level as opposed to an ordinance or directive adopted by the local public entity is of no consequence with respect to the application of the market participant exception.

NWSMA challenges this interpretation, however, claiming that the statute goes too far in that the statute specifically refers to "contractors" and affects the conduct of private parties in the market, in contravention of the dormant Commerce Clause. Defendant argue that section 115A.46 is only being applied to contractors through contract provisions or by amendments to existing contracts which the contractor has with the public entity. The Supreme Court addressed similar issues in White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) and in South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). "In both cases, the government reached beyond 'the boundary of formal privity of contract' to influence the economic relationships between its trading partners and other parties." See SSC, 66 F.3d at 514 (quoting White, 460 U.S. at 211 n.7). In White, the Supreme Court upheld an executive order in the City of Boston which required that all construction projects funded by the city were to be performed by a work force consisting of at least fifty percent Boston residents. White, 460 U.S. at 206. In effect, the contractors hired by the city were required to hire half of their workers from Boston. The Supreme Court recognized that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," but found it unnecessary to define the limits with precision and stated that:

> [T]he Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the Mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, "working for the city."

White, 460 U.S. at 211 n.7.

In contrast, in Wunnicke, the court examined an Alaskan program which provided for the sale of timber from state-owned forests at reduced prices but which also required at least partial processing of the timber in Alaska prior to it being shipped out of the state. IL. at 84-85. The Supreme Court held that the market participant exception did not apply and recognized that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." Id. at 98. Thus, this court must determine whether section 153A.46, subdivision 5, is more akin to the executive order in White which was subject to the market participant exception, or to the program in Wunnicke which was not.

In urging this court to apply the market participant exception, defendants assert that this case is similar to SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Cir. 1995), certiorari denied, 116 S. Ct. 911 (1996). In SSC, the City of Smithtown, New York, passed a "flow control" ordinance which required all residential and commercial garbage to be disposed of at an incinerator Id. at 505. Smithtown also created a residential garbage collection district and entered into a contract with private garbage haulers to pick up all household garbage in the district. Id. Under the contractual provisions, the haulers were required to take the garbage to the incinerator. Id. The SSC court invalidated the ordinance,

but stated that the central question in determining whether the contract constituted market participation was whether it more closely resembled Boston's local processing requirements in White or Alaska's local-processing requirements in South Central Timber. The Second Circuit determined that Smithtown was a participant in waste collection and waste disposal, and that the town was spending tax dollars to pay for the services, just as Boston was spending tax dollars to pay the salaries of its contractors' construction workers in White. 66 F.3d at 515. The Second Circuit explained:

> If Boston could require contractors for city-funded projects to hire a certain percentage of city residents, then Smithtown can require SSC to hire town residents to drive its garbage trucks - since those truck drivers would be "in a substantial if informal sense 'working for the city.'" [White, 460 U.S.] at 211 n.7, 103 S. Ct. at 1046 n.7. And if Smithtown can require SSC to hire local truck drivers, then it can require the hauler to use local incinerating services as well. It makes no difference in our estimation whether those services are provided by a private company ..., or by a public entity like Smithtown. Because the waste disposal services are "substantial[ly] if informal[ly]" being provided to Smithtown, the town can decide with whom it will deal.

SSC, 66 F.3d at 515.

This court concludes that the statute at issue in this case, which requires contractors hired by the public entities to comply with the county's solid waste management plan, is analogous to the contract requirements placed on the contractors in SSC. The court agrees that the State, through its subdivisions, acts as a market participant in the collection and

management of waste (if the public entity so chooses), and thus may dictate the terms for the collection and management of solid waste, since the contractors are in essence working for the public entity. Although the definition of "public entity" includes "contractors," the statute only applies to contractors who have a contract with a public entity. The inclusion of "contractors" in the definition of "public entity" does not transform the state and its subdivisions from market participants to market regulators, it simply clarifies the role of the contractors when they, as opposed to the public entity itself, collect and dispose of waste on behalf of the public entity. Because the market participant exception applies, the court does not reach the issue of whether the statute has a discriminatory effect on commerce.

2. Section 115A. 471

Plaintiff also challenges section 115A.471, which requires a public entity to do certain things if it chooses to manage waste using a waste management practice that is ranked lower on the list of preferred waste management practices than the waste management practice selected in the county plan. If a public entity decides to deviate from the county's plan by choosing a lesser preferred practice, the public entity must determine its potential liability, develop and implement a plan for managing the potential liability, and submit the information to the agency. See Minn. Stat. §115A.471. Defendants argue that NSWMA does not have standing to challenge section 115A.471.

This court's jurisdiction is limited by Article III of the U.S Constitution, which limits the judicial power of the federal courts to "cases" and "controversies." U.S. Const., art. III, § 2, cl. 1. A threshold question in every case is whether the plaintiff has standing to invoke the jurisdiction of the federal courts. The standing doctrine is "an essential and

unchanging part of the case- or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996) (recognizing that standing requirement is indispensable part of case). To establish standing within the constitutional core requirements of Article III, a plaintiff must satisfy three elements: (1) that plaintiff suffered an injury in fact; (2) that there is causal connection between plaintiff's injuries and the challenged action; and (3) that a favorable decision in the case would likely redress plaintiff's injuries. Lujan, 504 U.S. at 560; Warth v. Seldin, 422 U.S. 490, 508, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (placing burden of establishing standing on the party seeking federal jurisdiction). In addition to the constitutional standing requirements, courts have imposed prudential limits on the exercise of jurisdiction. See Ben Oehrleins, ___ F.3d at ___ (concluding that plaintiffs did not have standing based on prudential considerations to assert claims).

The defendants challenge plaintiff's standing in the context of a summary judgment motion. In Lujan, the Supreme Court reiterated the magnitude of a plaintiff's burden depending upon the stage in the proceedings:

> The party invoking federal jurisdiction bears the burden of establishing [the standing elements]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we

> presum[e] that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. R. Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan, 504 U.S. at 561 (internal case citations and quotations omitted).

The court will first address the constitutional minima required by Article III. The injury-in-fact element requires more than a cognizable interest; rather, NSWMA must sufficiently allege that its members are directly affected by the statute. See Sierra Club North Star Chapter v. Browner, 843 F. Supp. 1304, 1309 (D. Minn. 1993) (citing Lujan v Defenders of Wildlife, 504 U.S. 555 (1992). As discussed, the Minnesota Legislature did not similarly define "public entity" under section 153A.471 and section 115A.26. subdivision 5. "Public entity" under section 153.471 does not include a "contractor acting pursuant to a contract with a public entity." Compare Minn. Stat. § 115A.26, subd. 5 (defining "public entity" pursuant to section 16B.122, which includes contractors acting pursuant to contracts with a public entity), with Minn. Stat. § 153A.471 (defining "public entity" without the inclusion of contractors). Plaintiff is not a "public entity" as defined under section 115A.471 and does not contend that it is raising its arguments on behalf of a public entity. In short, section 115A.471 does not impose any requirements or burdens on the plaintiff which could be perceived as an injury in fact under the constitutional standing requirements.

This determination is underscored by the plaintiff's submissions to the court. A member of the association submitted an affidavit on behalf of plaintiff stating that "the costs of complying with these statutory requirements would be prohibitively expensive. Such liability determination and management would cost tens of thousands of dollars. This cost would in most, if not all, cases dwarf the size of [our] public entity[] waste disposal contracts." Affidavit of Sandra Lee Roskowiak, Vice President of Randy's Sanitation, at ¶ 2. Plaintiff did not substantiate its cost predictions or show an injury in fact. Even as to the speculated injury, there is no evidence that such losses are due to the requirements placed on public entities under section 115A.471.

In this instance, the court determines that NSWMA has failed to come forth with sufficient evidence of an injury in fact to satisfy the constitutional minima for standing to challenge section 115A.471. Because plaintiff lacks standing under Article III's requirements, the court need not address the prudential limitations on standing.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that defendants' motion for summary judgment is granted; and plaintiff's motion for summary judgment is denied. Plaintiff's action is dismissed with prejudice.[6]

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[6] The court recognizes that the parties did not move for summary judgment on count II of plaintiff's complaint which asserts a violation of section 1983 of Title 42, a statute creating no substantive rights, but providing a remedy when rights secured by federal law or the Constitution are deprived under color of state law. Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). An underlying constitutional right must exist before a cause of action under section 1983 will lie. Plaintiff must show that defendants violated a right, privilege or immunity protected by the Constitution or laws of the United States. Because the court has determined that no violation of the

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 19, 1997

David S. Doty, Judge
United States District Court

Commerce Clause exists and because that is the only other claim asserted in the complaint, the court also dismisses plaintiff's section 1983 claim.

115A.02 LEGISLATIVE DECLARATION OF POLICY; PURPOSES.

(a) It is the goal of this chapter to protect the state's land, air, water, and other natural resources and the public health by improving waste management in the state to serve the following purposes:

(1) reduction in the amount and toxicity of waste generated;

(2) separation and recovery of materials and energy from waste;

(3) reduction in indiscriminate dependence on disposal of waste;

(4) coordination of solid waste management among political subdivisions; and

(5) orderly and deliberate development and financial security waste facilities including disposal facilities.

(b) The waste management goal of the state is to foster an integrated waste management system in an manner appropriate to the characteristics of the waste stream and thereby protect the state's land, air, water, and other natural resources and the public health. The following waste management practices are in order of preference:

(1) waste reduction and reuse;

(2) waste recycling;

(3) composting of yard waste and food waste;

(4) resource recovery through mixed municipal solid waste composting or incineration; and

(5) land disposal.

115A.03 DEFINITIONS.

* * *

Subd. 25. **Processing.** "Processing" means the treatment of waste after collection and before disposal. Processing

includes but is not limited to reduction, storage, separation, exchange, resource recovery, physical, chemical, or biological modification, and transfer from one waste facility to another.

* * *

For the purpose of this section, waste is "unprocessed" if it has not, after collection and before disposal, undergone at lest one process, as defined in section 115A.03, subdivision 25, excluding storage, exchange, and transfer of the waste.

115A.46 REQUIREMENTS.

Subdivision 1. **General.** (a) Plans shall address the state policies and purposes expressed in section 115A.02 and may not be inconsistent with state law.

(b) Plans for the location, establishment, operation, maintenance, and postclosure use of facilities and facility sites, for ordinances, and for licensing, permit, and enforcement activities shall be consistent with the rules adopted by the agency pursuant to chapter 116.

* * *

(e) Plans must be submitted to the director for approval. When a county board is ready to have a final plan approved, the county board shall submit a resolution requesting review and approval by the director. After receiving the resolution, the director shall notify the county within 45 days whether the plan as submitted is complete and, if not complete, the specific times that need to be submitted to make the plan complete. Within 90 days after the a complete plan has been submitted, the director shall approve or disapprove the plan. If the plan is disapproved, reasons for the disapproval must be provided.

* * *

115A.471 PUBLIC ENTITIES; MANAGEMENT OF SOLID WASTE.

(a) Prior to entering into or approving a contract for the management of mixed municipal solid waste which would mange and waste using as waste management practice that is ranked lowed on the list of preferred waste management practices in section 115A.l02, paragraph (b), than the waste management practice selected for such waste in the county plan for the county in which the waste was generated, a public entity must:

(1) determine the potential liability to the public entity and its taxpayers for managing the waste in this manner:

(2) develop and implement a plan for managing the potential liability; and

(3) submit the information from clauses (1) and (2) to the agency.

(b) For the purpose of this subdivision, "public entity" means the state; an office, agency, or institution of the state; the metropolitan council; a metropolitan agency; the metropolitan mosquito control district; the legislature; the courts; a county; a statutory or home rule charter city; a town; a school district; another special taxing district; or any other general or special purpose unit of government in the state.

115A.80 DESIGNATION OF SOLD WASTE MANAGEMENT FACILITIES; PURPOSE.

In order to further the state policies and purposes expressed in section 115A.02, and to advance the public purposes served by effective solid waste management, the legislature finds and declare that it may be necessary pursuant to section 115A.80 to 115A.89 to authorize a qualifying solid waste management district or county to designate a solid waste processing or disposal facility.

473.801 DEFINITIONS.

Subdivision 1. **Terms.** For the purposes of section 473.801 to 473.849, the terms defined in this section have the meanings given them.

Subd. 2. **Local government unit.** "Local government unit" means any municipal corporation or governmental subdivision other than a metropolitan county located in whole or part in the metropolitan area, authorized by law to provide for the processing of solid waste.

Subd. 3. **Agency.** "Agency" means the Minnesota pollution control agency.

Subd. 4. **Application.** Unless otherwise provided the definitions of terms in section 115A.03 shall apply to section 473.801 to 473.845.

Subd. 5. **Director.** "Director" means the director of the office of environmental assistance.

Subd. 6. **Office.** "Office" means the office of environmental assistance.

473.803 METROPOLITAN COUNTY PLANNING.

Subdivision 1. **County master plans; general requirements.** Each metropolitan county, following adoption or revision of the metropolitan policy plan and in accordance with the dates specified therein, and after consultation with all affected local government units, shall prepare and submit to the direction for approval, a county solid waste master plan to implement the policy plan. The master plan shall be revised and resubmitted at such times as the metropolitan policy plan may require. The master plan shall be revised and resubmitted at such times as the metropolitan policy plan may require. The master plan shall described county solid waste activities, functions, and facilities; the existing system of solid waste generation, collection, and processing, and disposal within the county; proposed mechanisms for complying with the recycling requirements of section115A.551, and the

household hazardous waste management requirements of section 115A.96, subdivision 6; existing and proposed county and municipal ordinances and license and permit requirements relating to solid waste facilities and solid waste generation, collection, and processing, and disposal; existing or proposed municipal, county, or private solid waste facilities and collection services within the extent to which such facilities and services will or may be used to implement the policy plan; and any solid waste facility which the county owns or plans to acquire, construct, or improve together with statements as to the planned method, estimated cost and time of acquisition, proposed procedures for operation and maintenance of each facility; an estimate of the annual cost of operation and maintenance of each facility; an estimate of the annual gross revenues which will be received from the operation of each facility; an estimate of the annual gross revenues which will be received from the operation of each facility; and a proposal for the use of each facility after it is not longer needed or usable as a waste facility. The master plan shall, to the extent practicable and consistent with the achievement of other public policies and purposes, encourage ownership and operation of solid waste facilities by private industry. For solid waste facilities owned or operated by public agencies or supposed primarily by public funds or obligations issued by a public agency, the master plan shall contain criteria and standards to protect comparable private and public facilities already existing in the area from displacement unless the displacement is required in order to achieve the waste ma agement objectives identified in the plan.

473.811 COUNTIES AND LOCAL UNITS OF GOVERNMENT; WASTE MANAGEMENT.

* * *

Subd. 5a. **Ordinances; solid waste facilities.** Each metropolitan county shall by ordinance establish and from time to time revise rules, regulations and standards for sold waste facilities within the county, relating to location, sanitary operation, periodic inspection and monitoring, maintenance, termination and abandonment, and other pertinent matters. The county ordinance may require facilities accepting mixed municipal sold waste for disposal to install scales. The county ordinance may prohibit disposal facilities from accepting unprocessed mixed municipal solid waste for final disposal. The county ordinance shall require permits or licenses for solid waste facilities and shall require that such facilities be registered with a county office.

* * *

Subd. 5c. **County enforcement.** Each metropolitan county shall be responsible for insuring that waste facilities, solid waste collection operations licensed or regulated by the county and hazardous waste generation and collection operations are brought into conformance with, or terminated and abandoned in accordance with, applicable county ordinances; that operator or owners or both of such facilities or operations shall be responsible to the county for satisfactorily performing the procedures required. If operators or owners or both fail to perform, the county may recover the costs incurred by the county in completing the procedures in a civil action in any court of competent jurisdiction, or in the discretion of the board, the costs may be certified to the county auditor as a special tax against the land. The

ordinances may be enforced by action in district court or administrative penalty order authorized under section 116.072. The county may prescribe a criminal penalty for the violation of any ordinance enacted under this section not exceeding the maximum which may be specified for a misdemeanor.

* * *

473.848 RESTRICTION ON DISPOSAL.

Subdivision 1. **Restriction.** (a) For the purposes of implementing the waste management policies in sectino115A.02 and metropolitan area gals related to landfill abatement established under this chapter, a person may not dispose of unprocessed mixed municipal solid waste generated in the metropolitan area at a waste disposal facility unless the waste disposal facility meets the standards in section 473.849 and:

(1) the waste has been certified as unprocessible by a county under subdivision 2; or (2)(i) the waste has been transferred to the disposal facility from a resource recovery facility;

(ii) no other resource recovery facility serving the metropolitan area is capable of processing the waste; and

(iii) the waste has been certified as unprocessible by the operator of the resource recovery facility under subdivision 3.

(b) For purposes of this section, mixed municipal sold waste does not include street sweepings, construction debris, mining waste, foundry sand, and other materials, if they are not capable of being processed by resource recovery as determined by the council.

* * *

Supreme Court, U.S.
FILED
OCT 14 1998
OFFICE OF THE CLERK

No. 98-424

In the
Supreme Court of the United States
October Term, 1998

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,

Petitioner,

vs.

CHARLES W. WILLIAMS, in his capacity as Commissioner of the Minnesota Pollution Control Agency, and EDWARD GARVEY, in his capacity as Director of the Minnesota Office of Environmental Assistance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under Minnesota law, public entities are created by the state and are subject to the control and direction of the state. Is the state a market participant under the dormant Commerce Clause when it establishes conditions that its public entities must follow if they contract for waste management services?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Eighth Circuit Court of Appeals in this case. The opinion is contained in Petitioner's Appendix ("Pet. App.") at A-1 and is reported at 146 F.3d 595. The opinion of the district court (Pet. App. A-10) is reported at 966 F.Supp. 844.

STATEMENT OF THE CASE

This case involves the claim of Petitioner, the National Solid Waste Management Association ("NSWMA"), that Minn. Stat. § 115A.46, subd. 5 (1996), violates the dormant Commerce Clause. The challenged statute provides that if a public entity chooses to manage solid waste it must do so in a manner that is not inconsistent with its county's solid waste management plan, unless the public entity obtains the consent of the county.

This statute was first enacted in 1991. At that time, the statute applied to "political subdivisions," which included such entities as cities, towns, and counties. Act of June 4, 1991, ch. 337, § 16, 1991 Minn. Laws 2464. In 1995, the law was amended by substituting the term "public entity" for "political subdivision" and clarifying that the statute also applied when the public entity contracted for the management of solid waste as well as when the public entity used its own employees to manage waste.[1] Act of June 1, 1995, ch. 247,

---

[1] Minn. Stat. § 16B.122 subd. 1(f) (1996), defines the term "public entity" to mean "the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home

(Footnote Continued On Next Page.)

art. 1, § 8, 1995 Minn. Laws 2356. The effect of the change was to broaden the reach of the statute to include additional governmental units such as state agencies and offices. Thus, as now written, Minn. Stat. § 115A.46, subd. 5(b), states:

> After a county plan has been approved under subdivision 1, the plan governs all solid waste management in the county and *a public entity*, as defined in section 16B.122, subdivision 1, within the county *may not develop or implement a solid waste management activity*, other than an activity to reduce waste generation or reuse waste materials, *that is inconsistent with the county plan that the county is actively implementing without the consent of the county*.

(Emphasis added.)[2] Although the statute applies both when a public entity manages waste using its own employees and when it contracts with a waste hauler to manage waste on behalf of the public entity, NSWMA has focused its challenge on the contracting aspect of the statute.

Only public entities that choose to manage waste must comply with the statute. Some cities and towns in Minnesota

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rule charter city, a town, a school district, another special taxing district, or any contractor acting pursuant to a contract with a public entity."

[2] Although NSWMA did not limit its constitutional challenge to subpart (b) of Minn. Stat. § 115A.46, subd. 5, only that subpart is, as a practical matter, still in effect. This is because subpart (a) refers to requirements *before* a county plan has been approved. Since all counties now have approved solid waste management plans, any challenge to subpart 5(a) is moot. Affidavit of Arthur E. Dunn ("Dunn Aff.") ¶ 13, Appellant's Appendix in the court of appeals ("Appellant's App.") 00151.

choose to provide garbage collection and management among the public services available to their citizens; others do not. For example, Minnesota's two largest cities, Minneapolis and St. Paul, which are of about equal size, have adopted different approaches. Minneapolis collects and manages waste from households but not from businesses. Second Affidavit of Arthur E. Dunn ("Dunn Aff. #2"), ¶ 7, Appellees' Appendix in the court of appeals ("Appellees' App.") 3. In contrast, St. Paul only collects recyclables; individual home owners and businesses are responsible for arranging with private haulers to collect and manage other waste. Dunn Aff. #2, ¶ 8, Appellees' App. 3. Significantly, the disposal of waste collected by private haulers in St. Paul remains unaffected by the law. In contrast, when a public entity like Minneapolis chooses to manage waste, the statute does apply and the public entity must either comply with its county plan or get the county's consent to manage the waste differently. Contrary to NSWMA's statement, public entities have, in fact, sought and received consent from counties to manage waste in a manner different from the county plan.[3]

Each of Minnesota's 87 counties has adopted a solid waste management plan as required by state law. *See* n.1 *supra*. The plan evaluates the waste management needs and problems in the county and identifies and evaluates various waste management alternatives. Dunn Aff., ¶ 13, Appellant's App. 00151. Each county is required to address in its plan how the county will meet the state's recycling goals and manage waste tires, household hazardous waste, and major

[3] For example, the City of East Grand Forks received the consent of Polk County to take a portion of its waste to a landfill in North Dakota, instead of to the incinerator listed in the county plan. *See* Dunn Aff. #2, ¶ 10, Appellees' App. 3-4.

appliances. Dunn Aff. #2, ¶ 4, Appellees' App. 2. Many counties have developed programs for yard and food waste composting, and for management of used oil, construction debris and lead acid and dry cell batteries. *Id.* For waste not managed by these methods, counties must evaluate and select either resource recovery or landfilling as their preferred method of waste management. *Id.*

Not surprisingly, counties have chosen different waste management methods, depending on the unique needs of the county. For example, 49 counties and one waste district have chosen resource recovery using incineration of waste with recovery of energy, or composting of mixed municipal solid waste, or a combination of these methods. *Id.* The remaining 38 counties have selected landfilling as their waste management method. *Id.* Contrary to NSWMA's suggestion, public entities that manage waste are required to comply with county plans not only in the 49 counties that have chosen resource recovery, but also in the 38 counties that have chosen landfilling as their preferred method of waste management.

County plans can identify a waste management method in a variety of ways. For example, some county plans may select landfilling, without specifying a particular facility. Appellant's App. 00011. Public entities that manage waste in that county can then take their waste to any landfill. *Id.* Other county plans may express a preference for a particular facility. *Id.* In that case, public entities that manage waste in the county must take their waste to the identified facility. *Id.* Some counties have selected out-of-state landfills and processing facilities in neighboring states of North Dakota, Iowa, and Wisconsin. *See, e.g.*, Appellant's App. 00049, 00054, 00058, and 00138. Some counties own and operate facilities; others do not.

To assist in the development and implementation of county-wide solid waste management programs, the state and its taxpayers provided nearly $140 million between 1989 and 1995 to counties and other local units of government. The state has provided this funding for the development of programs for management of household hazardous waste and problem materials, for implementation of recycling, and for the design and construction of solid waste management facilities for recycling, waste-to-energy production, composting, tire processing, household hazardous waste and problem material management, yard waste management, and transfer stations. *See* Third Affidavit of Arthur E. Dunn ("Dunn Aff. # 3"), ¶¶ 3-6, Appellees' App. 9-10. Counties have also spent significant amounts of money to prepare and implement county plans and construct and operate solid waste resource recovery facilities and landfills. Finally, public entities that manage solid waste spend public funds when they collect and manage waste or hire contractors to do so.

County plans embody state policy on a wide range of waste management matters, including the goals of reducing the amount and toxicity of waste, the recovery of energy from waste, the reduction in the dependence on land disposal, and the coordination of solid waste management among political subdivisions. *See* Minn. Stat. § 115A.02 (1996), Pet. App. A-30. County plans were prepared and adopted after significant public and private input. Dunn. Aff., ¶ 11, Appellant's App. 00150. All county plans are reviewed and approved by the Minnesota Office of Environmental Assistance and must be updated every five years. *Id.* County plans are comprehensive solid waste management planning documents designed to ensure adequate, environmentally protective solid waste management for the future to protect public health and welfare. *See* Minn. Stat. § 115A.46, subd. 1 (1996), Pet. App. A-31.

The public entities to which the statute applies (*see* n.1 *supra*) were created by the Minnesota Legislature, which, under the Minnesota Constitution, has broad control over such governmental entities. *See* Minn. Const., art. 12, § 3. The legislature's control over and involvement in the economic decisions of its political subdivisions is extensive and includes, for example, statutorily-mandated bidding requirements and purchasing preferences and extensive oversight of local government budgeting, accounting, and contracting procedures. *See infra* at 17-18.

NSWMA's lawsuit was filed in 1996 against the Director of the Office of Environmental Assistance and the Commissioner of the Minnesota Pollution Control Agency ("the State") challenging the constitutionality of Minn. Stat. § 115A.46, subd. 5 (1996), and a related statute under the Commerce Clause of the United States Constitution.[4] NSWMA alleged that the challenged statute violates the dormant Commerce Clause by barring or restricting interstate commerce in waste disposal services.

The district court granted summary judgment to the State holding that the state, acting through its political subdivisions, was a market participant and in that capacity was not subject to the limitations imposed by the Commerce Clause. *NSWMA v. Williams*, 966 F. Supp. 845 (D. Minn. 1997); Pet. App. at A-10. The court reasoned that since state agencies and

[4] The related statute, Minn. Stat. § 115A.471 (1996), requires public entities that want to undertake certain waste management practices to first evaluate and develop a plan for managing their own potential liability. The court of appeals affirmed the decision of the district court that NSWMA did not have standing to challenge the provisions of Minn. Stat. § 115A.471. NSWMA has not requested review of this aspect of the court of appeals' decision.

political subdivisions derive their authority from the state, the logical extension of that relationship includes the ability of the state to set parameters for its governmental units as market participants. *Id.* at 851; Pet. App. at A-21 and A-22. In reaching this conclusion, the court was guided by the analysis of the Third Circuit Court of Appeals in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), and the Ninth Circuit Court of Appeals in *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173 (9th Cir. 1992), which both upheld the constitutionality under the market participation exception of state statutes that placed conditions on the contracting authority of their governmental subdivisions. *NSWMA*, 966 F. Supp. at 850-51; Pet. App. at A-21 and A-22.

In upholding the constitutionality of the statute, the district court did not accept NSWMA's arguments that the statute was "flow control" of the type found to be unconstitutional by the Court in *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994). *NSWMA*, 966 F. Supp. at 847; Pet App. at A-13 and A-14. The district court recognized that the statute here does not regulate the private market for waste management and, therefore, does not implicate the Commerce Clause concerns that animated the *Carbone* decision. Instead, because the statute establishes conditions only for public entities, not private parties, that manage waste, the court found the market participation exception to the Commerce Clause applicable. *See id.* at 851-52; Pet. App. at A-22 through A-25.

The Eighth Circuit Court of Appeals affirmed the decision of the district court. *NSWMA v. Williams*, 146 F.3d 595 (8th Cir. 1998); Pet. App. A-1. It agreed with the reasoning of the Third Circuit Court of Appeals in *Trojan Technologies* and held that the state is a market participant

when it establishes conditions that its governmental subdivisions must follow when they contract for waste management services. The court acknowledged that under Minnesota law public entities are creations of the state, derive their power solely from the state, and are subject to the unlimited authority of the state. The court reasoned:

> We are hard pressed to fathom how an entity created by the state, controlled by the state, and subject to the absolute power of the state, should be considered an independent entity when it undertakes to buy waste services on the open market. Public entities should not be considered independent from the state when they contract for the removal of their waste.

146 F.3d at 599-600; Pet. App. at A-8.

The court of appeals concluded that the state's action was in the role of purchaser of waste disposal services, and that the statute "does not reach beyond those parties who, like the Association's [NSWMA's] members, 'are actually and freely dealing with the state in its business enterprise.' " 146 F.3d at 600; Pet. App. at A-8, quoting *Chance Management, Inc. v. South Dakota*, 97 F.3d 1107, 1112 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1083 (1997).

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review of this case. There is no conflict in the circuit courts that this Court needs to resolve because a consensus has now developed in the Third, Fourth, Ninth, and Eighth Circuits that the state is a market participant when it specifies conditions that its subordinate governmental subdivisions must follow in purchasing goods and services. This consensus is based on

the control, long recognized by this Court, that a state has over its governmental subdivisions. The only decision to the contrary is a 14-year-old decision from the Seventh Circuit, which has not been followed by other circuit courts, and which is not squarely in conflict with the more recent circuit court decisions because the Seventh Circuit decision was based, in part, on the "substantial autonomy" of local school boards in Illinois. The decision of the Eighth Circuit in this case is consistent with the decisions of this Court both on the control that a state has over its governmental subdivisions and on the market participation exception to the Commerce Clause.

A CONSENSUS HAS DEVELOPED IN THE CIRCUIT COURTS AND, THUS, THERE IS NO CONFLICT THAT DEMANDS THE ATTENTION OF THIS COURT.

There is no need for this Court to grant review in this case to resolve a conflict among the circuit courts. Although arguably a conflict may have existed in 1990 between the Third Circuit and the Seventh Circuit when this Court denied review of the Third Circuit Court's decision in *Trojan Technologies*, four circuit courts have now addressed and analyzed the issue and have reached a consensus on the matter, all rejecting the Seventh Circuit's approach. The Third Circuit (in 1990), the Ninth Circuit (in 1992), the Fourth Circuit (in 1994) and now the Eighth Circuit (in 1998) are in accord that a state is a market participant when it establishes conditions that its subordinate governmental units must follow when they contract for goods or services. All four circuit courts based their conclusions that the state was a market participant on the well-recognized control that the state has over its governmental units, as defined by state law, and on the fact that the statutes applied only to government

purchases, not purchases by private parties. Thus, rather than presenting a live conflict that requires resolution by this Court, the Seventh Circuit decision relied on by NSWMA offers only a faulty analysis that has been rejected by every circuit court that has subsequently addressed the issue.

The 1984 decision of the Seventh Circuit whose reasoning has been rejected by all four circuit courts is *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984). In that case the court declared unconstitutional under the Commerce Clause an Illinois law requiring contractors on local government public works projects to employ Illinois labor if available and capable of performing the work. The court held that in order for a state to qualify as a market participant in placing restrictions on a local government's contracting authority, the state must provide either funding for or administrative oversight of the local government activity. *See id.* at 495. The court concluded that Illinois was not a market participant, basing its decision in part on the "substantial autonomy" that local school boards had in Illinois and in part on the court's view that state funding or involvement in the project was a necessary component for the state to be a market participant. *See id.*

The first court to reject the Seventh Circuit's reasoning was the Third Circuit in 1990 in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990). In that case, the Third Circuit upheld the constitutionality of a Pennsylvania statute under the market participation exception to the Commerce Clause which required suppliers contracting with state agencies *and* local governmental entities to provide products made of American-made steel. The court concluded that Pennsylvania was a market participant, not a market regulator, because under Pennsylvania law local governmental units exist only by "grace of state authority" with such powers

as the state provides. *See id.* at 911. Consequently, the state could restrict the contracting authority of political subdivisions, such as cities and towns, in the same manner that it restricts the contracting authority of state agencies, since under Pennsylvania law both derive their authority solely from the state. *See id.* Because the statutory requirement applied only to the state and its subordinate governmental units, not private parties, the statute was consistent with the purposes underlying the Commerce Clause. *See id.* at 912. This Court denied review of the decision. *See Trojan Technologies, Inc. v. Pennsylvania*, 501 U.S. 1212 (1991).

The Third Circuit specifically rejected the reasoning of the Seventh Circuit that political subdivisions, such as cities and towns, should be treated differently from state agencies for market participation purposes:

> We find no compelling analytical difference between a local government unit and central state agencies. Both exist only through affirmative acts of the state. A municipality derives its authority from the state. Under Pennsylvania law it is clear that the local bodies covered by the statute exist only by grace of state authority and with such powers as the state affirmatively provides. We see no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies. Imposing such restrictions on central state agencies certainly would be permitted and we do not believe restrictions on local bodies stand in any different light.

916 F.2d at 911 (citations and footnote omitted).[5] Finding that the statute fit within the market participant exception to the Commerce Clause, the court concluded:

> As the ultimately controlling public purchaser, the Commonwealth enjoys the same right to specify to its suppliers the source of steel to be used in any supplies provided as is enjoyed by similarly situated private purchasers.

Id. at 911.

The Third Circuit also rejected the Seventh Circuit conclusion that the Commerce Clause prevents state "regulation" of the purchases of governmental subdivisions, stating:

> Nor do we find that the commerce clause's underlying purposes require a broad prohibition against state regulation of local municipal purchases. As noted in *Reeves*, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free *private* trade in the national marketplace ... [t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U.S. at 436-37, 100 S. Ct. at 2277 (emphasis added). Nor, we take it, is there any indication of an intent to limit the market operations of local public entities. Given that local entities can presumably decide for

[5] This Court has noted that when a state requires state agencies to purchase certain in-state products, the state is a market participant. *See Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992).

> themselves to contract only for American steel, cf. *White*, 460 U.S. at 215, 103 S. Ct. at 1048, we think it clear that the Commonwealth, from which local municipalities derive their power, can impose similar limits.

Id. at 912. *See also* Barton B. Clark, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615 (1993) (concurring with the reasoning of the Third and the Ninth Circuits that their market participation analysis gives proper consideration to the inherent variations in state law concerning the authority of the state over its political subdivisions).

Two years later, the Ninth Circuit concurred with the reasoning of the Third Circuit. In *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173 (9th Cir. 1992), the Ninth Circuit upheld, against a Commerce Clause challenge, an Alaska statute giving a seven percent bidding preference to Alaska milk harvesters in contracts to supply milk to school districts in Alaska. The court concluded that Alaska was a market participant when it used its school districts to implement a milk purchase program and reasoned, like the Third Circuit, that the state was a market participant because political subdivisions exist at the will of the state. *See id.* at 1179.

Then, in 1994 the Fourth Circuit agreed with the reasoning of the Third and Ninth Circuits when it upheld under the market participation doctrine a state statute and regulation that gave a preference to local products and local vendors when the state and its educational bodies contracted for such purchases. *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1319-20

(4th Cir. 1994). Although the statute did not require compliance by local governments, it allowed local governments to use state contracts, which contained this preference, to purchase goods. The statute was challenged because of the claimed "regulatory effect" on local governments that resulted from the ability of local governments to purchase goods using state contracts. *See id.* at 1318. In rejecting the argument that the statute was regulatory, and thus subject to the Commerce Clause restrictions, the court agreed with the Third and Ninth Circuits. The court explained:

> [T]he distinction [*W.C.M. Window*] draws between state and local governments simply does not make sense in this constitutional matter. [Citations to *Trojan Technologies* and *Big Country* omitted.] There is little analytic reason to treat the two separately for Commerce Clause purposes; market participation by *either* is immunized from negative Commerce Clause attack. *White*, 460 U.S. at 208, 103 S. Ct. at 1044. State rules that "regulate" the market actions of a state's constituent agencies, departments and other state-level organizational manifestations are conceded not to be considered "market regulating" for negative Commerce Clause purposes. To posit then that the state is "regulating" the market in requiring local governments to abide its rules thus only sidesteps the actual inquiry here, which is to determine at what point the state stops regulating itself and its action in the market *qua* market participant (a type of action immune from attack) and begins regulating non-state actors (a type of action subject to attack).

Smith Setzer, 20 F.3d at 1319-20 (emphasis in original). The court answered this question by focusing on the party that is being "regulated" -- the public entity:

> This having been stated, we cannot discern a valid distinction to explain why state regulations that bind local governmental units should not be considered equally as innocuous, constitutionally speaking, as state regulations that bind state-wide governmental units. Rather than focus on the state's action to see whether it is "regulatory," or on the quantitative impact of the regulation involved, the proper inquiry is into *whom* the state regulates: so long as the regulated party is a public entity, we do not believe the market participant doctrine's bounds are exceeded.

Id. at 1320 (emphasis in original).

Finally, the Eighth Circuit in this case also concurred with the reasoning of the Third Circuit and upheld the constitutionality of Minn. Stat. § 115A.46, subd. 5, concluding that the state is a market participant when it requires public entities that choose to manage waste to do so consistent with their county's solid waste management plan. Like the Third Circuit and the Ninth Circuit, the Eighth Circuit also based its decision on the control, under state law, that the state has over its governmental subdivisions. *See NSWMA v. Williams*, 146 F.3d 595, 599-600 (8th Cir. 1998); Pet. App. at A-8. Because under Minnesota law the state has complete authority over its subordinate governmental units, the court of appeals held that the state is a market participant when it establishes conditions that its public entities must follow in contracting for waste management services. *See id.* The court of appeals concluded that the state's action was in

the role of purchaser of waste disposal services and that the statute did not reach beyond those parties who were freely dealing with the state in its business capacity. *See id.*

Thus, because a consensus has now developed in the circuit courts, there is no reason for the Court to grant review in this case. As described in Parts A and B below, this prevailing view in the circuit courts is consistent with this Court's decisions on the relationship between a state and its governmental subdivisions and on the market participation exception to the Commerce Clause.

A. The Decision Below Is Consistent With Previous Decisions Of This Court On The Relationship Between A State And Its Governmental Subdivisions.

This Court has long recognized that the status of political subdivisions is a matter of state, not federal, law. *See Avery v. Midland County, Texas*, 390 U.S. 474, 480 (1968). In reviewing decisions involving political subdivisions, this Court has acknowledged the near complete authority that a state has over its governmental units. Thus, in *Reynolds v. Sims* this Court described political subdivisions as existing to assist the state in carrying out state functions with the power they exercise "in the absolute discretion of the state." 377 U.S. 533, 575 (1964). In *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), this Court described the relationship between the state and its political subdivisions as follows:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may

> withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.

Id. at 187 (footnote and citation omitted).

This view of political subdivisions is consistent with their status under Minnesota law. In Minnesota, the Legislature has broad authority to create local governmental units and define their authority. *See* Minn. Const., art. 12, § 3 (legislature may provide for creation, organization, administration, consolidation, division, and dissolution of local units of government and their functions). Because governmental subdivisions are subject to the broad control and direction of the legislature, the legislature can require governmental subdivisions to perform duties of state concern. *See Associated Schools of Independent Dist. No. 63 v. School Dist. No. 83*, 142 N.W. 325, 326 (Minn. 1913). This legislative authority has been described by Minnesota courts as unlimited. *See State ex rel. Erickson v. Gram*, 210 N.W. 616 (Minn. 1926). Even home rule cities, which in some states may have a separate status independent of legislative control, are, in Minnesota, subject to the legislature's right to enact general laws that are paramount to home rule charters. *See id.* In fact, the definition of "public entity" to which the challenged statute applies includes home rule charter cities. *See* n.1 *supra.*

The authority Minnesota has over its governmental subdivisions is reflected in the extensive involvement that the state has in the economic decisions and life of its political subdivisions. For example, the state requires counties, cities, towns and school districts to use a competitive bidding

process when procuring equipment and supplies, making improvements, and contracting for work and labor. *See, e.g.*, Minn. Stat. §§ 471.345, 375.21, 429.041, and 412.311 (1996). The Legislature also requires public entities to give a preference when contracting for certain types of goods and services, such as recycled content paper, soy-based inks, packing peanuts made from vegetable starches, and goods and services that reduce the quantity and toxicity of waste. *See* Minn. Stat. §§ 16B.122 and 16B.123 (1996). Moreover, the State Auditor, whose office is established by the Minnesota Constitution with its duties defined by the Legislature, is charged with overseeing the management of the fiscal matters of local governments. *See* Minn. Const. art. 5, § 4 and Minn. Stat. § 6.01 (1996). The State Auditor is required to audit and inspect the accounting and budgeting systems of cities, towns, counties, school districts and other governmental subdivisions, and may prescribe uniform systems of accounting. *See* Minn. Stat. §§ 6.46-6.51 (1996). The State Auditor may also examine the accounting procedures and practices of contractors of local governments relevant to the contractors' work for local governments. *See* Minn. Stat. § 6.551 (1996). Thus, the state's direction to public entities regarding management of solid waste is but one of many ways in which the state determines how those subordinate entities carry out market activities.

The court of appeals acknowledged this broad control that Minnesota has over its governmental subdivisions and based its decision that the state is a market participant partly on that conclusion. *NSWMA v. Williams*, 146 F.3d at 599-600; Pet. App. at A-8. Likewise, the Third Circuit in *Trojan Technologies* also based its decision that Pennsylvania was a market participant in part on local governments in Pennsylvania existing only by "grace of state authority." *Trojan Technologies*, 916 F.2d at 911. The Ninth Circuit also

based its decision on the fact that political subdivisions "exist at the will of the state." *Big Country Foods*, 952 F.2d at 1179. In contrast, the Seventh Circuit in *W.C.M. Window* based its decision that the state was not a market participant partly on the "substantial autonomy" that school districts have in Illinois. *W.C.M. Window*, 730 F.2d at 495. This difference in underlying state law is sufficient to distinguish the holding of the Seventh Circuit from the holdings of the Third, the Ninth and the Eighth Circuits. Thus, this Court need not review the court of appeals' decision.

Despite this well-recognized relationship between a state and its governmental subdivisions, NSWMA argues that the reasoning of the court of appeals is "too simplistic," citing this Court's decisions interpreting the Eleventh Amendment to the United States Constitution and antitrust laws. Petition at 20. First, NSWMA notes that although the Eleventh Amendment protects states from being sued in federal court for money damages, it does not provide such immunity to local governments. *Id.* This argument overlooks the unique function of the Eleventh Amendment in our federalist system, which is to maintain the constitutionally-protected balance of power between states and the federal government. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). That the state and its political subdivisions do not share the attributes of sovereignty in the Eleventh Amendment context says nothing about their relationship in the proprietary context of market participation.

NSWMA also argues that this Court should review the court of appeals' decision because its reasoning is inconsistent with antitrust law, which does not treat political subdivisions as "equivalent" to the State for purposes of immunity from antitrust liability. Petition at 20. However, the Eighth Circuit did not hold that the state and its political subdivisions are

"equivalent," since political subdivisions are not by their nature sovereign entities. Rather, the court of appeals concluded that the state, acting through its public entities over which it has absolute authority, was a market participant. 146 F.3d at 599-600; Pet. App. at A-8. This view of the relationship between the state and its political subdivisions is fully consistent with antitrust law since municipalities are shielded from antitrust liability when they act pursuant to a clearly articulated state policy that authorizes the challenged anticompetitive conduct. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). As this Court has explained, the *Parker* doctrine, which established state action immunity, "preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415-16 (1978).

Rather than being inconsistent with antitrust laws, the reasoning of the Eighth Circuit is fully consistent with this Court's interpretation of such laws. Through the operation of the state action immunity doctrine, federal antitrust laws recognize the authority of the state to define how it will administer state-determined policies through its governmental subdivisions. This approach is consistent with the application of the market participation exception in this case.

B. The Consensus That Has Developed In The Circuit Courts Is Consistent With This Court's Decisions On The Market Participation Exception To The Commerce Clause.

NSWMA argues that the challenged statute is really just regulatory "flow control" enacted to circumvent this Court's decision in *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994), by "regulating" public entities, and that this Court should accept review to prevent this result.[6] Petition at 14. This argument ignores the important distinction between market participation and market regulation. A state's self-imposed limitations on how government --whether state or local -- will manage waste, rather than how private parties must manage waste, is not a regulation within the meaning of the Commerce Clause. This Court's decisions support this distinction.

The focus of the Commerce Clause is on "state taxes and regulatory measures impeding free *private* trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) (emphasis added). Thus, this Court in *C & A Carbone* struck down a flow control ordinance that required all solid waste to be processed at a designated transfer station before leaving the municipality. As a regulation of private traders in the solid waste market, the flow control ordinance was evaluated under the Commerce Clause analysis.

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[6] As noted in the Statement of the Case, Minnesota did not enact this statute, as NSWMA implies, in 1995 after the *Carbone* decision when "faced with growing pressure to prop up governmentally financed waste disposal facilities." Petition at 7. Rather, this statute was first enacted in 1991, long before the 1994 decision of this Court in *Carbone*, or any other court struck down certain Minnesota flow control ordinances as violating the Commerce Clause.

Although the Commerce Clause imposes limits on the power of states to regulate private trade in interstate commerce, it does not prevent a state from participating in the market and exercising its right to favor its own citizens or products over others. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). Consequently, when a governmental entity enters the market as a participant, it is not subject to the inherent restrictions of the Commerce Clause and it enjoys unrestricted power, like a private business, to determine with whom it will deal and to set the terms and conditions on which it will make purchases of goods and services. *See Reeves*, 447 U.S. at 439 nn.10 and 12. *See also White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 211 (1983) (holding that the city of Boston was a market participant when it required its contractors to hire city residents, even when that requirement was applied to the subcontractors of the city's contractor with which the city did not have formal privity of contract). As a result, the interstate economic impact of a state's conduct is not significant for Commerce Clause purposes when the government is participating in, rather than regulating, the market. *See id.* at 210. This distinction between the state acting as a market regulator and the state acting as a market participant "makes good sense and sound law." *Reeves*, 447 U.S. at 436.

A type of activity protected by the market participation exception is public contracting for goods and services, which is a proprietary function, not an exercise of a government's regulatory power. *See American Yearbook Co. v. Askew*, 339 F. Supp. 719, 721-22 (M.D. Fla.) (three-judge court), *aff'd*, 409 U.S. 904 (1972), *cited with approval in Reeves*, 447 U.S. at 437 n.9. One of the ways that government defines how it will purchase goods and services is through statutes that prescribe the terms and conditions of public purchases.

Numerous lower courts, in addition to the Third, Fourth, Ninth, and Eighth Circuit Courts, have upheld against Commerce Clause challenges the constitutionality of state-mandated purchasing requirements on public bodies. For example, in *American Yearbook*, the court rejected the argument that a Florida statute that required that all public printing be done in Florida violated the Commerce Clause. The court held instead that the printing requirement was merely a state purchasing requirement. The court explained:

> What plaintiff fails to recognize is that those statutes [cited by the plaintiff] regulated private industry. Trade regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not.

339 F. Supp. at 725.

Although the *American Yearbook* decision was reached four years before this Court used the phrase "market participation" to describe such activities, the decision in *American Yearbook* was cited with approval in *Reeves* in its discussion of market participation principles. This Court noted that many state courts have upheld against a Commerce Clause challenge preference statutes like those in *American Yearbook* that specify the conditions of government purchases:

> *Alexandria Scrap* does not stand alone. In *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla. 1972), a three-judge District Court upheld a Florida statute requiring the State to obtain needed printing services from in-state shops. It reasoned that "state proprietary functions" are exempt from Commerce Clause scrutiny. *Id.*, at 725. This Court affirmed

> summarily. Numerous courts have rebuffed Commerce Clause challenges directed at similar preferences that exist in "a substantial majority of the states." The only clear departure from this pattern, drew a strong dissent and has been uniformly criticized in later decisions.

Reeves, 447 U.S. at 437 n.9 (citations omitted).[7]

Despite the fact that this Court has recognized that such preference statutes exist in a "substantial majority of the states," NSWMA raises the specter that if the Court does not review this decision, every state will use its purchasing power to achieve its own "parochial interests." Petition at 22. But it is those very state interests that the Court has recognized are an important consideration of state sovereignty that the market participation exception was intended to protect. This Court has cautioned that because of considerations of state sovereignty, courts should exercise restraint in reviewing such proprietary activities, especially those that involve traditional governmental functions. *See Reeves*, 447 U.S. at 438 and n.10. Because each state is a guardian and trustee for its people, the state may "fairly claim a measure of sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." *Id.* Moreover, when a government

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[7] Among the cases cited by the Court in *Reeves* were ones in which the challenged statute applied to purchases both by state agencies and local units of government. *See City of Phoenix v. Superior Court*, 514 P.2d 454 (Ariz. 1973) (upholding against a Commerce Clause challenge an Arizona statute that gave a bidding preference to qualified resident contractors on contracts for work to be paid from public funds) and *Denver v. Bossie*, 266 P. 214 (Colo. 1928) (upholding against a Commerce Clause challenge a Colorado statute requiring public works projects to give a preference for Colorado products).

acts in its proprietary capacity, its decisions often involve considerations that may be "subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, [the decision in] *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." *Id.* at 439.

Solid waste management in Minnesota did not happen by itself. It was the result of at least 16 years of federal, state and local planning and implementation efforts and approximately $140 million in taxpayer money to develop and implement county-wide solid waste management programs. Dunn Aff., ¶ 22, Appellant's App. 00153; Dunn Aff. # 3, ¶¶ 3-6, Appellees' App. 9-10. The challenged statute is a part of the state's policy efforts to see that solid waste managed by governmental entities is managed consistent with the state's environmental goals. The statute at issue insures that public entities, which the state created to carry out state-defined functions, undertake solid waste management activities in a manner that is consistent with the state's planning efforts. The market participation exception is designed to allow the state to make and implement such policy choices through market place decisions. Unlike the invalid flow control ordinances to which NSWMA so frequently refers, the statute at issue here does not regulate disposal of waste by private parties. The court of appeals correctly upheld the constitutionality of the challenged statute under the market participation exception to the Commerce Clause, and there is no need for this Court to review its decision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: October 14, 1998

Respectfully submitted

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Supreme Court, U.S.
FILED
OCT 14 1998
OFFICE OF THE CLERK

No. 98-424

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

National Solid Waste Management Association,
Petitioner,

v.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

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MOTION OF
BFI WASTE SYSTEMS OF NORTH AMERICA, INC.
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of National Solid Waste Management Association for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

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[1] Petitioner has consented to this *amicus* brief. Counsel for Respondents has informed undersigned counsel of record that they do not oppose the filing of the *amicus* brief.

BFI is one of the nation's largest companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. As a collector and transporter of solid wastes, BFI is subject to solid waste "flow control" programs and requirements that were developed subsequent to and despite this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In addition, BFI operates 78 municipal solid waste landfills in the United States that are or can be adversely affected by the implementation of post-*Carbone* economic flow control schemes such as the one at issue in this case.

BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by the Respondents in this case. With all due respect to the parties to this case, BFI believes that its broad, national experience and the perspective it has gained from that experience will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

Respectfully submitted,

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No. 98-424

IN THE
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October Term, 1998

National Solid Waste Management Association,

Petitioner,

v.

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Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the question presented in the Petition for Writ of Certiorari. In the interest of judicial economy, the question is not repeated here.

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INTEREST OF *AMICUS CURIAE*

BFI Waste Systems of North America, Inc. ("BFI") is one of the largest companies in the world which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical and residential solid wastes. BFI owns or operates a network of 78 municipal solid waste landfills in the United States. Those landfills accept for disposal wastes generated by residences and commercial establishments. BFI owns a landfill in Dakota County, Minnesota that has been affected by the implementation of the challenged Minnesota statute. In addition, BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

REASONS FOR GRANTING THE WRIT

Through an expansive reading of the "market participant" doctrine, the courts below sanctioned a Minnesota statute that requires local governments to adhere to the waste management choices made by counties. The legislation serves no legitimate environmental purpose; because it discourages landfilling, it acts merely to ensure the flow control of solid waste to facilities such as incinerators. A state statute that requires local governments to adhere to county solid waste management plans, in the absence of any state funding for local "purchasing" activities, should not fall within the scope of the market participant doctrine. The decision below encourages circumvention of *Carbone* by the simple guise of state-level market participation.

The fiction of market participation in the absence of any financial involvement has consequences that may extend far beyond Minnesota. Review by this Court is necessary to ensure that *Carbone* is not rendered, through similar solid waste management "planning" statutes, a constitutional nullity. In addition, the obvious inconsistencies in the judicial rulings regarding the scope of the market participant doctrine (as described in the Petition for Writ of Certiorari) justify this Court's review.

THE MINNESOTA STATUTORY SCHEME FAILS TO PROMOTE A LEGITIMATE ENVIRONMENTAL OBJECTIVE; EXISTING FEDERAL AND STATE RULES FOR MUNICIPAL SOLID WASTE LANDFILLS ESTABLISH PROTECTIVE STANDARDS.

The Minnesota statute upheld by the Eighth Circuit Court of Appeals (Minn. Stat. Section 115A.46, subd. 5)) has had the effect of precluding any meaningful use of landfilling as a waste management method, particularly when applied in conjunction with the 1980 waste "hierarchy" provision (Minn. Stat. Section 115A.02(b)). The prohibition against landfilling condemns local governments to utilize more expensive waste treatment methodologies. Moreover, while there may have been a rational environmental justification in 1980 for disfavoring landfilling through a statutory scheme that essentially ensures the "flow control" of waste to incinerators and composting facilities, no legitimate reason now exists for perpetuating such costly, inefficient, and uncompetitive requirements. Federal standards, set forth at 40 C.F.R. Part 258 (1997), which have been incorporated into Minnesota rules and permit conditions, establish criteria fully protective of human health and the environment. Landfilling today is as environmentally sound as any type of "processing" favored by the Minnesota legislation and insisted upon by county waste management plans.

The Part 258 standards were adopted in 1991 after extensive analysis by the U.S. Environmental Protection Agency ("EPA") of the risks presented by substandard facilities. The Federal criteria were promulgated in accordance with Congress's insistence in 1984 that EPA standards "be those necessary to protect human health and the environment". Section 4010(c) of the Resource Conservation and Recovery Act provides that if a particular form of regulatory control is necessary to "protect human health and the environment", reduced levels of protection should not be tolerated. Congress was aware that--in one year alone--at least 500 municipal landfills violated state groundwater protection standards, 845 violated state air standards, and at least 600 were formally cited for having contaminated surface water. Out of 163 documented case studies, 146 landfills were actively contaminating groundwater and 73 landfills were contaminating surface water. In 1986, the EPA estimated that only fifteen percent of all municipal solid waste landfills had liners, only five percent had leachate collection systems, and only twenty-five percent had groundwater monitoring systems. 53 Fed. Reg. 33,319 (1988). Similarly, the congressional history is replete with examples of ground and surface water contamination resulting from the operation of poorly designed and maintained landfills. *See, e.g.*, H.R. CONF. REP. No. 1133, 98th Cong., 2d Sess. 116-17, reprinted in 1984 U.S.C.C.A.N. 5, 678-88.

Moreover, the Congress clearly desired--indeed, it intended--the closure of substandard facilities. Congress noted that "(t)he underlying standard for facilities subject to this amendment to Subtitle D remains protection of the environment." 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984). As then-Senator Randolph noted, individual facilities might suffer hardship--and possibly close--if they cannot meet requirements deemed necessary and practicable for the industry as a whole: "New statutory requirements for Subtitle D facilities may hasten the closure of many solid waste facilities that have

only a few years of remaining capacity. The requirements could also hasten the closure of facilities with substantial capacity, but that are either unable or unwilling to accept new regulatory costs." *Id.*

The Part 258 regulations fulfilled Congress's expectations, by establishing risk-based criteria that, in the EPA's words, "ensure that municipal solid waste landfills are operated and designed to safely manage household hazardous waste and conditionally exempt small quantity generator waste. . . ." 58 Fed. Reg. 46,923 (Sept. 3, 1993). In releasing the rules, the EPA noted that the Federal requirements "will increase public confidence that landfills are designed to protect human health and the environment", protect "property values located within the vicinity of new landfills", safeguard "the existence value of ground water near landfills", and minimize "the need for future cleanups" in order to reduce "the potential impacts on future generations (or the federal government, as in the case of a Superfund site)." *Id.*

Moreover, the Agency stressed that "the final rule, by more fully reflecting the cost of safe waste disposal, will also lead to more responsible waste management practices and promote resource conservation." *Id.* at 50,986. The EPA agreed "that regionalization of solid waste management in rural areas, employing larger, better located, designed and operated MSWLFs [Municipal Solid Waste Landfills], is preferable to continued use of small, poorly planned facilities that may pose health and environmental threats to their communities." *Id.*

In developing the Federal requirements, the EPA also emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities." *Id.* at 50,989.

The Federal rules contain stringent requirements regarding liners, leachate collection systems, corrective action for closure and post-closure care, and financial assurance. 40 C.F.R. §§258.40-70. In addition, limitations are placed on the location of facilities near airports and in floodplains, unstable areas, wetlands, seismic impact zones and fault areas. Affected existing facilities must either make a demonstration of no adverse impact or close in accordance with the regulations. 40 C.F.R. §§258.10-16.

Other provisions of the regulations include restrictions on public access to the landfill, daily cover requirements to minimize disease vector and other problems, methane gas controls to prevent gas explosions, controls on runoff from the facility to prevent releases to surface and ground water resources, and restrictions on the landfilling of certain wastes, including hazardous waste and liquid wastes, to minimize the toxicity and quantity of leachate that may threaten ground water. 40 C.F.R. §§258.20-29.

The following provisions illustrate the significantly increased design, construction, monitoring, and post-closure maintenance responsibilities imposed upon landfill operators. Numerous siting criteria ensure that MSWLFs are located so as to ensure environmental protection and safe operation. For example, under the EPA rules owners/operators of existing MSWLFs and proposed lateral expansions or new MSWLFs located in 100-year floodplains must demonstrate that the landfill "will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in a washout of solid waste". 40 C.F.R. §258.11. Likewise, proposed lateral expansions and new MSWLFs may not be located in wetlands in states without approved programs. Proposed MSWLFs may not be located in approved states, such as Minnesota, unless the owner/operator of the facility can make

demonstrations to the State Director that are essentially equivalent to those under Section 404 of the Federal Clean Water Act. 40 C.F.R. §258.12.

The EPA regulations provide that proposed lateral expansions and new MSWLFs "shall not be located in seismic impact zones" in states without approved programs. Proposed MSWLFs may not be located in seismic impact zones in approved states "unless the owner or operator demonstrates to the State Director that all containment structures, including liners, leachate collection systems, and surface water control systems, are designed to withstand the maximum horizontal acceleration in lithified earth material for the site". The necessary documentation must be placed in the site operating record and the State Director must be notified of its completion. 40 C.F.R. §258.14.

The standards also address the daily operation of facilities. They provide that owners or operators of all MSWLFs must implement a program at the facility for the detecting and preventing the disposal of regulated hazardous waste and PCB waste. The program must include, at a minimum: (1) random inspections of incoming loads unless the owner or operator takes other steps to ensure that incoming loads do not contain regulated hazardous wastes or PCB wastes; (2) records of any inspections; (3) training of facility personnel to recognize regulated hazardous wastes and PCB wastes; and (4) notification to the State Director of an authorized state or the EPA regional administrator if in an unauthorized state if a regulated hazardous wastes or PCB waste is discovered at the facility. 40 C.F.R §258.20.

The rules also require that all MSWLFs must cover disposed solid waste at the end of each operating day with six inches of soil to control disease vectors, fires, odors, blowing litter, and scavenging. Alternative materials of alternative

thicknesses may be approved by the Director of an approved State if the owner or operator shows that the alternative material or thickness will adequately control the concerns listed above without presenting a threat to human health and the environment. 40 C.F.R. §258.21.

Similarly, owners and operators of all MSWLFs must, pursuant to the EPA rules, ensure through compliance with detailed standards that the concentration of methane gas generated by the facility does not pose an explosion hazard. The owner or operator must implement a routine methane-monitoring program. The monitoring shall be performed at least quarterly and if methane gas levels are detected above the levels listed above, the owner or operator must "immediately take all necessary steps to ensure protection of human health and notify the State Director". The owner or operator must also record the methane levels detected within the operating record within seven days of detection. Within 60 days of detection, the owners or operators must implement a remediation plan for the methane gas releases, place a copy of the plan in the operating record, and notify the State Director that the plan has been implemented. The plan shall describe the nature and extent of the problem and propose a remedy. 40 C.F.R. §258.23.

All new MSWLF units and lateral expansions must be constructed with an approved site-specific liner and leachate collection system design. The design must ensure that Maximum Contaminant Levels promulgated pursuant to the Safe Drinking Water Act will not be exceeded in the uppermost aquifer at the relevant "point of compliance" (*i.e.*, the property line or no more than 150 meters from the limits of fill). Alternatively, a composite liner design specified in the regulations may be utilized. The composite liner design must consist of a flexible membrane liner placed directly over at least 2 feet of compacted soil and a leachate collection system designed and constructed to

maintain less than a 30cm depth of leachate over the liner. 40 C.F.R. §258.40.

In addition, the Federal rules establish stringent and detailed standards to ensure protection of groundwater and drinking water supplies. 40 C.F.R. §§258.50-58. The monitoring program must include the installation of monitoring wells (some of which must be installed at the relevant point of compliance) which yield representative groundwater samples from the uppermost aquifer downgradient from the landfill. Periodic sampling for 15 metals and 47 organic compounds must occur; when concentrations are above certain limits, the facility owner/operator must initiate corrective action measures that are protective of human health and the environment, control the source of the release, and properly manage any wastes that are generated.

Owners/operators of all landfills must, under the EPA rules, install a final cover system that is designed to minimize infiltration and erosion. In addition, closure of a landfill unit must be in accordance with a previously approved plan, and the closure activity must be overseen and certified by an independently registered professional engineer. 40 C.F.R. §258.60. Following closure, the owner or operator must record a notation on the deed to the landfill facility property. In addition, all owners/operators must conduct post-closure care for thirty years; the monitoring period may be extended if necessary to protect human health and the environment. 40 C.F.R. §258.61.

Finally, owners/operators are required to maintain financial assurance during all periods of operation and post-closure monitoring for a typical period of thirty years to ensure that the costs of closure and post-closure or remediation are not borne by third parties (*i.e.*, the general public). The rules require that owners/operators establish continuous financial assurance,

using one or more of the methods (such as trust funds, insurance, and letters of credit) approved by the EPA, for the cost of hiring a third-party to conduct closure and post-closure activities. The amount of financial assurance must be adjusted yearly during the active life of the site as well as during the post-closure period to account for inflation as well as any changes in landfill conditions. The extensive EPA requirements make redundant the liability risk obligations contained in the Minnesota legislation (*see* Petition for Writ of Certiorari, at 8 fn. 2). 40 C.F.R. §§258.70-74.

These Federal regulations have led to the closure of hundreds of smaller landfills. Those facilities in operation today meet or exceed the EPA requirements. They provide a cost-effective and environmentally protective means of managing the Nation's solid wastes. Yet the Minnesota statute essentially precludes their use—in order to promote a system of flow control that this Court has already rejected.

THE CHALLENGED LEGISLATION NOW SERVES ONLY ONE PURPOSE: TO PERPETUATE AN UNCONSTITUTIONAL FLOW CONTROL SYSTEM.

The regulatory standards described above did not exist in 1980. Today, however, standards that the EPA has described as fully protective of human health and the environment are firmly in place. Minnesota's applicable solid waste management laws and regulations meet (and, in some instances, significantly exceed) the Federal criteria in stringency. Other EPA and Minnesota provisions are applicable to MSWLFs and expand upon the Part 258 rules. For example, air emissions from MSWLFs are regulated under stringent guidelines established pursuant to the Clean Air Act. 40 C.F.R. Part 60. Leachate produced by MSWLFs must be treated or utilized according to Part 258 or Clean Water Act regulations. *See, e.g.*, 40 C.F.R. §258.28.

The criteria applicable to MSWLFs are in many instances considerably more stringent than the requirements applicable to hazardous waste treatment, storage, and disposal facilities, even though MSWLFs present far fewer potential risks. Whatever environmental justification may have existed nearly two decades ago for disfavoring--much less effectively precluding--landfilling as a legitimate waste management option is no longer present. The landfilling of municipal solid waste is a safe, legitimate management practice. The challenged Minnesota legislation now works simply as an economically counterproductive and constitutionally impermissible flow control scheme.

Regulatory restrictions on landfilling are, moreover, restrictions on the use of privately owned facilities. While only about a quarter of the Nation's landfills are privately owned, the disposal capacity of those landfills is more than half the total permitted capacity. These larger landfills have been designed to comply with the strict Federal standards and their economic viability is dependent upon the receipt of waste from numerous jurisdictions. Obviously, the Minnesota legislation acts as a deterrent to the use of these state-of-the-art facilities, including landfills located outside the State, which are sized and designed to receive wastes from a large number of political subdivisions .

In addition, the challenged statute works to discourage responsible solid waste management planning, at either the state or the local level, through cooperative partnerships among state and local governments, the private sector, and individual citizens. Local governments in Minnesota simply have no choice; they must follow the dictates of county plans, and inevitably must deliver wastes to designated, flow-controlled "processing" (incinerator and composting) facilities.

The mandatory restrictions on the ability of local governments to choose have also led to unjustified higher costs for residential and commercial waste generators within

Minnesota. Because alternative technologies have proven to be more expensive than state-of-the-art landfilling, residents of the State, like those of many other jurisdictions which continue to impose flow control requirements, incur unnecessary costs. They will likely continue to do so in the absence of a judicial determination that the existing legislation is constitutionally impermissible.

REVIEW BY THIS COURT IS NECESSARY TO ELIMINATE THE HIGHER COSTS AND ECONOMIC BALKANIZATION PRODUCED BY THE MINNESOTA STATUTE.

The private sector responded to rapidly rising disposal costs in the 1980's by building more disposal capacity. While the number of landfills in the United States has dropped dramatically, particularly since the Part 258 regulations went into effect, overall landfill capacity has increased. As a result, disposal charges have fallen as landfills compete for business. Yet Minnesota waste generators and local governments cannot take advantage of this cost-effective marketplace. They must instead abide by antiquated county plans that typically continue to rely on "processing" mandates and flow control strategies to assist incinerators and recycling facilities that in many cases require mandatory directed waste flows to be economically viable. Without the challenged legislation and the statutory predisposition against landfilling, local governments and waste generators could avoid higher fees by turning to alternative disposal options both within Minnesota and in other states.

This case presents precisely the type of economic balkanization feared by the drafters of the Commerce Clause. A recent study conducted by the National Economic Research Associates ("NERA") summarized the historical development of flow control mandates:

Flow control refers to local laws by which local governments direct that the municipal solid waste (including residential, commercial, and industrial) generated within their jurisdictions be disposed of and/or processed at designated facilities. Local governments have been imposing such controls at least since the early 1970's, principally for two reasons--to protect sizeable investments in waste facilities and to generate fee revenues to finance solid waste programs. Many local governments built and/or financed large-scale waste management facilities which require substantial minimum waste flows to cover costs. Many of these facilities, for example, are resource recovery plants which operate under contracts to provide steam for industrial processes and electricity generation. Some of these plants would not be economic without these contracts, and the contracts require that they provide a specific amount of stream requiring a specific amount of waste. Consequently, local governments need to direct waste to these plants to protect their investments. In fact, according to the Resource Recovery Yearbook, about 48% of the resource recovery plants constructed since 1964 benefit from flow controls. More recently, local governments have financed and built transfer stations and material recovery facilities. These facilities, especially the latter, also require substantial waste flows to be economic. Public landfills have been less reliant on flow controls, although economies of scale may encourage larger facilities. Some local governments also have turned to flow control to generate fee revenues often used to finance waste

> management programs such as recycling and household hazardous waste. Without flow control, waste generators could avoid such fees by turning to alternative disposal options in other jurisdictions.

National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 2.

Moreover, there has been a pronounced increase in disposal/incineration capacity in many areas of the Nation, including the Midwest. Upgrading and expansions of local sites, a revolution in transportation, and the growth of transfer station infrastructure have all have led to a competitive market in which a community can contract for long-term disposal at very advantageous rates. Private companies are striving to be the low-cost provider in their field. Governments that enter into partnerships with private companies can enjoy financial benefits and still meet their obligations to their constituents.

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide." National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 1-2. Moreover, as the EPA noted, flow control mandates provide no ascertainable environmental benefit. U.S. Environmental Protection Agency, REPORT TO CONGRESS ON FLOW CONTROLS AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 (1995). Given the excessive and burdensome costs of flow control, measures such as the Minnesota legislation stand as significant obstacles to the goal of a non-balkanized economy. This Court is once again presented with the opportunity to confirm and make explicit its ruling in

Carbone. In addition, the obvious conflict in the judicial rulings involving the scope of the market participant doctrine amply justifies this Court's intervention.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one that impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in *Carbone*, state and local governments have continued their efforts to create and sustain protectionist schemes that thwart the free flow of commerce. The Minnesota legislation at issue in this case is yet another example. The statute in question promotes no legitimate environmental goal; its continued application serves merely to ensure, through the fiction of market participation, the flow control of waste to preferred facilities. Such end-runs around *Carbone* threaten the viability of this Court's precedents and the goals advanced by the Commerce Clause. In addition, as Petitioner has demonstrated, in light of the inconsistent rulings on the scope of the market participant doctrine there is a need for clear and unequivocal guidance from this Court on the question presented.

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October 12, 1998

No. 98-424

FILED
OCT 22 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

October Term, 1998

National Solid Waste Management Association,

Petitioner,

vs.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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INTRODUCTION

Respondents sharpen the focus of this case. They concede that Minnesota's regulatory system requires waste processing and proscribes landfilling of public entity waste when the legislative preference scheme prescribed in Minn. Stat. § 115A.02 (1996) has been adopted. Moreover, respondents make no claim that the state pays for the local disposal services being regulated. While they assert that the state has contributed to waste disposal solutions, they do not contend that those funds are used to buy day-to-day disposal services. Instead, local governments, using funds of local taxpayers, pay to dispose of their own solid waste. The state's only claim to market participant status is derivative – through local units of government.[1]

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[1] Respondents point to the existence of one city that has permission to landfill waste, rather than process it as per the county plan. Brief of Respondents at 3 n.3. This is the only local governmental unit with such permission. Such consent does not help respondents, as permission to ship waste to North Dakota was given initially in the 1980's, well before the 1995 legislation that amended Minn. Stat. § 115A.46, subd. 5 and added § 115A.471. (R.A. 3-4.)

East Grand Forks would not be permitted to landfill waste in North Dakota today. Contrary to what respondents imply, see Brief of Respondents at 21 n.6, in 1995 the Minnesota Legislature reacted to the *Carbone* decision by effectively eliminating the possibility that any political subdivision would seek to landfill waste. *See* 1995 Minn. Laws, ch. 247 art. 1 §§ 8-9 (expanding the reach of § 115A.46, subd. 5 and adding § 115A.471).

ARGUMENT

Respondents concede there is a conflict among the circuits, but their claim of a consensus in favor of the position taken below is unpersuasive.

Respondents admit that there is a clear, irreconcilable conflict among the circuits over a state's status as a market participant when it dictates the purchasing activities of local units of government. Brief in Opposition at 9. But review is not necessary, they argue, because there is a "consensus" that Judge Posner and the Seventh Circuit were incorrect in the decision reached in *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984). On closer examination, this supposed consensus is neither compelling, nor foreclosing of the conflict among the circuits.

The first court of appeals to differ with the Seventh Circuit was the Third Circuit in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991). While reaching a market participant conclusion opposite to the Seventh Circuit, the Third Circuit addressed a challenge under the foreign commerce provision of the Commerce Clause. *Id.* at 910-12. By enacting a "Buy American" statute, Pennsylvania raised an issue of the state's potential interference with the federal government's foreign relations power. *Id.* at 913-14. That issue is not raised here. A "Buy American" statute also does not raise the specter of national marketplace "Balkanization" that discrimination against interstate commerce does. Moreover, this Court has reserved the question whether discrimination against foreign commerce requires the same degree of scrutiny as discrimination against interstate commerce. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).

The Ninth Circuit was the next to address the question raised here. In *Big Country Foods, Inc. v. Board of*

Education, 952 F.2d 1173 (9th Cir. 1992), the court rejected the Seventh Circuit's analysis of market participation. The value of the Ninth Circuit's decision as precedent is limited because the court held that by committing "to pay for the milk," Alaska was a market participant regardless of whether the Anchorage School District was independent of the state. *Id.* at 1180.

Respondents further cite to the Fourth Circuit decision in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), as evidence of the supposed consensus they claim exists rejecting *Bernardi*. Respondents do not, however, contest what petitioner demonstrated earlier – that the discussion in *Smith Setzer* rejecting the Seventh Circuit's analysis of the question presented here was pure dicta.

The consensus respondents claim exists is not as strong as they would have this Court believe. The issue is undeniably open in the Fourth Circuit, and *Trojan Technologies* could be viewed as a foreign commerce case. Moreover, the Seventh Circuit's decision in *Bernardi* is not some old case to be left in the dustbin of history. It was authored by one of the preeminent jurists of that court and cited recently in Commerce Clause cases in the Seventh Circuit. *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745, 748 (7th Cir. 1993); *see Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995) (Cudahy, J. concurring).

Regardless of how the cases that form respondents' supposed consensus are viewed, what cannot be ignored is the direct, sharp conflict between the decision in this case and that of the Seventh Circuit. The difference between the Seventh Circuit and the other circuit courts cannot be explained away by this Court's prior market participant precedents. Thus, this case is the appropriate vehicle to address this unsettled question and resolve the conflict.

This case is not to be distinguished from *Bernardi* by any meaningful differences in the autonomy of local units of government.

Respondents attempt to distinguish *Bernardi* on the ground that the Seventh Circuit justified its decision on the autonomy in Illinois of local units of government, while in Minnesota local units of government are said to be subject to a host of restrictions. Brief of Respondents at 17-19. This argument ignores that the circuit courts on which respondents rely did not make any detailed analysis of the degree of autonomy local units of government actually enjoyed. The Third Circuit relegated its discussion of municipal autonomy to a footnote. *Trojan Technologies*, 916 F.2d at 911 n.15. The Fourth Circuit, when rejecting the Seventh Circuit's analysis, did not cite any state law authority. *Smith Setzer*, 20 F.3d at 1319-20. Indeed, the Ninth Circuit cited to California law, but not Alaskan law, to justify its result. *Big Country Foods*, 952 F.2d at 1179 (citing *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971)).

What the Eighth Circuit did, as in the decisions on which that court relied, was to resort to a hoary formalism from the Nineteenth Century that local units of government exist at the pleasure of the state that created them. *See, e.g., City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868). This rule, called Dillon's Rule, may have once made sense.[2] The sole Minnesota authority the Eighth Circuit relied upon is one that cites Dillon as its first authority. (App at A-8, citing *State ex rel. Erickson v. Gram*, 169 Minn 69, 71, 210 N.W. 616, 616 (1926).) But Dillon's Rule ignores the practical realities of modern municipal government. Today's

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[2] The name derives from a Nineteenth Century scholar of municipal law, John F. Dillon. *See* Barton B. Clark, *Give 'Em Enough Rope: States, Subdivision and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 636 n.123 (1993).

cities, counties and other local units of government must address and resolve complex issues of public finance, public services, public safety and other matters of local concern that belie Dillon's Rule. In meeting these needs, what the Seventh Circuit said about the autonomy of local school districts in Illinois could be said for Minnesota school districts or other local units of government. *Compare Bernardi*, 730 F.2d at 495 *with* Minn. Stat. §§ 123.33 and 123.35 (1996).

Because of these modern day pressures, states – like Minnesota – have devolved power downward to local units of government. In Minnesota, as in many other states, cities and counties can adopt home rule charters that furnish them with a large measure of autonomy in local affairs. *See State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958)("The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld.") These units of government levy taxes, issue bonds, contract for services – the list could go on. *See, e.g.*, Minn. Stat. § 471.345 (1996) (contracts), § 471.57 (1996 (taxes), and § 475.52 (1996) (bonds). That their powers may be regulated by the state does not detract from the large measure of independence local units of government possess. While the question of state preemption of local governmental authority may not have the constitutional dimensions it has in federal-state relations, the question is analytically similar. But it does not follow that because a state, like the federal government, may preempt the authority of a local unit of government, that a local unit of government is merely the alter ego of the state.

This Court's precedents on the Eleventh Amendment and on diversity jurisdiction support the Seventh Circuit's position in *Bernardi*.

Respondents suggest that the distinction the Court has drawn in its Eleventh Amendment jurisprudence between states and cities or other lesser units of government has no application here. They argue that the determination of which governmental entities within a state gain the protection of the Eleventh Amendment has no application to the market participant doctrine. Brief of Respondents at 19.

This argument is misplaced. The Eleventh Amendment may affect the balance of power between the federal government and the states, but so does the Commerce Clause, which protects the federal interest in a robust national market from state protectionism. If cities and counties are merely the alter egos of the state for Commerce Clause purposes, then logically they should fall within the ambit of the Eleventh Amendment. In other words, because the Eleventh Amendment shields states, then it must also shield its instrumentalities. But the amendment does not ordinarily shield cities and counties, and the market participant doctrine likewise should not ordinarily shield state regulation of local procurement decisions that discriminate against interstate commerce. *Cf. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Nat. Resources*, 504 U.S. 353, 361 (1992) (states "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through State itself.")

Rather, under the Eleventh Amendment analysis, as well as under the market participant exemption, the determining test is whether the local units of government are indepenent actors from the state. This test is not complicated. The Court followed a straightforward analysis of the question in *Mount Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S.

274 (1977). In *Doyle* the question was whether a local school district was an arm of the state or an independent political subdivision outside Eleventh Amendment protection. While the school district received "guidance" and funding from the state, the district's power to issue bonds and levy taxes made it a political subdivision and not part of the state itself. 429 U.S. at 280.[3]

Similarly, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Court rejected a claim by a county that diversity jurisdiction was lacking because it was merely an instrument of the state and thus not a citizen of a state for purposes of diversity jurisdiction. Under California law, the county was an independent body that could sue and be sued, and thus the Court held the county was a citizen of the state and not merely an alter ego of the state. *Id.* at 717-21. These cases show that it is not difficult to determine the independence of a political subdivision for market participant purposes.

The Eighth Circuit's resort to an outdated formalism should be rejected as inconsistent with modern municipal law and the purposes of the Commerce Clause. When local units

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[3] Of particular note in *Doyle* is the Court's reference to Ohio law that distinguished between the state and its political subdivisions. 429 U.S. at 280. The term "State" did not include "political subdivisions," while the latter term encompassed local school districts. 429 U.S. at 280. Here, Minn. Stat. § 115.46, subd. 5 cross-references § 16B.122 for the definition of a public entity covered by the provision. The definition of a public entity in § 16B.122 is as follows:

> "Public Entity" means the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another special taxing district, or any contractor.

Minn. Stat. § 16B.122, subd. 1 (f) (1996). Plainly the legislature intended that cities and counties are not "an office, agency or institution of the state." Thus, as in *Doyle*, these local units of government are not "arm[s] of the State." 429 U.S. at 280.

of government in Minnesota buy waste disposal services with funds they raise themselves, these units of government are the market participants. They, and not the state, will be sued if they do not pay their vendors. It will be the local units of government, and not the state, who will sue the vendors for bad service. When the state tells these local units of government where to buy waste disposal services – that is market regulation. *See Fort Gratiot*, 504 U.S. at 361. If, as here, that regulation discriminates against interstate commerce, it should be subject to Commerce Clause scrutiny. The principles the Commerce Clause protects are best advanced by the position the Seventh Circuit took in *Bernardi* on the question presented here. The Court should grant the petition to resolve the conflict over this important question.

CONCLUSION

For the foregoing reasons and those advanced earlier, petitioner requests that the Court grant the petition for a writ of certiorari to review the decision of the Eighth Circuit in this case.

Respectfully submitted,

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